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REPORTS OF CASES
DETERMINED IN THE
APPELLATE COURTS
OF ILLINOIS

**WITH A DIRECTORY OF THE JUDICIARY OF THE STATE
CORRECTED TO APRIL 10, 1915, AND ABSTRACTS OF
CASES AS DESIGNATED BY THE COURTS
UNDER ACT APPROVED JUNE 27, 1913,
IN EFFECT JULY 1, 1913.**

VOL. CXC
A. D. 1915.

LAST FILING DATE OF REPORTED CASES:

FIRST DISTRICT, DECEMBER 31, 1914..
SECOND DISTRICT, DECEMBER 3, 1914.
THIRD DISTRICT, OCTOBER 16, 1914.
FOURTH DISTRICT, NOVEMBER 14, 1914.

EDITED BY
THE PUBLISHERS' EDITORIAL STAFF

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1915

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JUN 9 1915

DIRECTORY OF THE JUDICIARY DEPARTMENT OF THE STATE OF ILLINOIS.

CORRECTED TO APRIL 10, 1915.

The judiciary department of the State of Illinois is composed of (1) the Supreme Court; (2) Appellate Courts; (3) Circuit Courts; (4) Courts of Cook County; (5) City Courts; (6) Municipal Court of Chicago; (7) County and Probate Courts.

(1) THE SUPREME COURT.

The Supreme Court consists of seven justices, elected for a term of nine years, one from each of the seven districts into which the State is divided.

Formerly the State was divided into three grand divisions, Southern, Central and Northern, in which the terms were held, with one clerk for each of the three grand divisions elected for a term of six years, the court sitting at Mount Vernon, Springfield and Ottawa.

In 1897 these divisions were consolidated into one, comprising the entire State, and provision made that all terms of the court be held in the city of Springfield, on the first Tuesday in October, December, February, April and June of each year.

REPORTER.

SAMUEL P. IRWIN.....Bloomington.

JUSTICES.

First District—ALBERT WATSON.....Mt. Vernon.

Second District—WILLIAM M. FARMER.....Vandalia.

Third District—FRANK K. DUNN.....Charleston.

Fourth District—GEORGE A. COOKE.....Aledo.

Fifth District—CHARLES C. CRAIG.....Galesburg.

Sixth District—JAMES H. CARTWRIGHT.....Oregon.

Seventh District—ORRIN N. CARTER.....Chicago.

The Chief Justice is chosen by the court, annually, at the June term. The rule of the court is to select as successor to the presiding justice the justice next in order of seniority who has not served as Chief Justice within six years last past. Mr. Justice Cartwright is the present Chief Justice.

CLERK.

CHARLES W. VAIL, Chicago.

LIBRARIAN.

RALPH H. WILKIN, Springfield.

(2) APPELLATE COURTS.

These Courts are held by the Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One clerk is elected in each district.

REPORTERS.

Reported by the publishers' editorial staff.

FIRST DISTRICT.

Composed of the county of Cook.

Court sits at Chicago on the first Tuesdays of March and October.

CLERK—James S. McInerney, Ashland Block, Chicago.

EDWARD O. BROWN, Presiding Justice, Ashland Block, Chicago.

WM. H. MCSURELY, Justice, Ashland Block, Chicago.

FRANK BAKER, Justice, Ashland Block, Chicago.

BRANCH B.*

ALBERT C. BARNES, Presiding Justice, Ashland Block, Chicago.

MARTIN M. GRIDLEY, Justice, Ashland Block, Chicago.

FREDERICK A. SMITH, Justice, Ashland Block, Chicago.

BRANCH C.**

JAMES S. BAUME, Presiding Justice, Galena.

WARREN W. DUNCAN, Justice, Marion.

EMERY C. GRAVES, Justice, Geneseo.

BRANCH D.**

JOSEPH H. FITCH, Presiding Justice, Ashland Block, Chicago.

KICKHAM SCANLAN, Justice, Ashland Block, Chicago.

HUGO PAM, Justice, Ashland Block, Chicago.

SECOND DISTRICT.

Composed of the counties of Boone, Bureau, Carroll, DeKalb, DuPage, Grundy, Henderson, Henry, Iroquois, Jo Daviess, Kane, Kankakee, Kendall, Knox, Lake, La Salle, Lee, Livingston, Marshall, McHenry, Mercer, Ogle, Peoria, Putnam, Rock Island, Stark, Stephenson, Warren, Whiteside, Will, Winnebago and Woodford.

Court sits at Ottawa, La Salle county, on the first Tuesdays in April and October.

CLERK—Christopher C. Duffy, Ottawa.

DORRANCE DIBELL, Presiding Justice, Joliet.

DUANE J. CARNES, Justice, Sycamore.

JOHN M. NIEHAUS, Justice, Peoria.

THIRD DISTRICT.

Composed of the counties of Adams, Brown, Calhoun, Cass, Champaign, Christian, Clark, Coles, Cumberland, DeWitt, Douglas, Edgar, Ford, Fulton, Greene, Hancock, Jersey, Logan, Macon, Macoupin, Mason, McDonough, McLean, Menard, Montgomery, Morgan, Moultrie, Piatt, Pike, Sangamon, Schuyler, Scott, Shelby, Tazewell and Vermilion.

Court sits at Springfield, Sangamon county, on the first Tuesdays in April and October.

CLERK—George L. Tipton, Springfield.

GEORGE W. THOMPSON, Presiding Justice, Galesburg.

EDGAR ELDBEDGE, Justice, Ottawa.

WILLIAM B. SCHOLFIELD, Justice, Marshall.

* This court is a branch of the Appellate Court of the first district, and is held by three judges of the Circuit Court, designated and assigned by the Supreme Court under the provisions of the act of the General Assembly, approved June 2, 1897. Hurd's Statutes, 1897, 508, Laws of 1897, 185, J. & A. ¶ 2981.

** Established under act of June 6, 1911, J. & A. ¶ 2989.

FOURTH DISTRICT.

Composed of the counties of Alexander, Bond, Clay, Clinton, Crawford, Edwards, Effingham, Fayette, Franklin, Gallatin, Hamilton, Hardin, Jackson, Jasper, Jefferson, Johnson, Lawrence, Madison, Marion, Massac, Monroe, Perry, Pope, Pulaski, Randolph, Richland, Saline, St. Clair, Union, Wabash, Washington, Wayne, White and Williamson.

Court sits at Mount Vernon, Jefferson county, on the fourth Tuesdays in March and October.

CLERK—Charles C. Johnson, Mount Vernon.

JAMES C. McBRIDE, Presiding Justice, Taylorville.

HARRY HIGBEE, Justice, Pittsfield.

THOMAS M. HARRIS, Justice, Lincoln.

(3) CIRCUIT COURTS.

Exclusive of Cook county, the State of Illinois is divided into seventeen judicial circuits, as follows:*

FIRST CIRCUIT.

The counties of Alexander, Pulaski, Massac, Pope, Johnson, Union, Jackson, Williamson and Saline.

Judges: A. W. LEWIS, Harrisburg.

WARREN W. DUNCAN, Marion.

WILLIAM N. BUTLER, Cairo.

SECOND CIRCUIT.

The counties of Hardin, Gallatin, White, Hamilton, Franklin, Wabash, Edwards, Wayne, Jefferson, Richland, Lawrence and Crawford.

Judges: ENOCH E. NEWLIN, Robinson.

WILLIAM H. GREEN, Mt. Vernon.

JACOB R. CREIGHTON, Fairfield.

THIRD CIRCUIT.

The counties of Randolph, Monroe, St. Clair, Madison, Bond, Washington and Perry.

Judges: LOUIS BERNREUTER, Nashville.

GEORGE A. CROW, East St. Louis.

WILLIAM E. HADLEY, Collinsville.

FOURTH CIRCUIT.

The counties of Clinton, Marion, Clay, Fayette, Effingham, Jasper, Montgomery, Shelby and Christian.

Judges: ALBERT M. ROSE, Louisville.

JAMES C. McBRIDE, Taylorville.

THOMAS M. JETT, Hillsboro.

FIFTH CIRCUIT.

The counties of Vermillion, Edgar, Clark, Cumberland and Coles.

Judges: WILLIAM B. SCHOLFIELD, Marshall.

E. R. E. KIMBROUGH, Danville.

MORTON W. THOMPSON, Danville.

* LAWS 1897, 188, J. & A. § 3070.

SIXTH CIRCUIT.

The counties of Champaign, Douglas, Moultrie, Macon, DeWitt and Platt.

Judges: WILLIAM G. COCHRAN, Sullivan.
WM. K. WHITFIELD, Decatur.
FRANKLIN H. BOGGS, Urbana.

SEVENTH CIRCUIT.

The counties of Sangamon, Macoupin, Morgan, Scott, Greene and Jersey.

Judges: JAMES A. CREIGHTON, Springfield.
FRANK W. BURTON, Carlinville.
NORMAN L. JONES, Carrollton.

EIGHTH CIRCUIT.

The counties of Adams, Schuyler, Mason, Cass, Brown, Pike, Calhoun and Menard.

Judges: HARRY HIGBEE, Pittsfield.
ALBERT AKERS, Quincy.
GUY R. WILLIAMS, Havana.

NINTH CIRCUIT.

The counties of Knox, Warren, Henderson, Hancock, McDonough and Fulton.

Judges: GEORGE W. THOMPSON, Galesburg.
HARRY M. WAGGONER, Macomb.
ROBERT J. GRIER, Monmouth.

TENTH CIRCUIT.

The counties of Peoria, Marshall, Putnam, Stark and Tazewell.

Judges: JOHN M. NIEHAUS, Peoria.
THEODORE N. GREEN, Pekin.
NICHOLAS E. WORTHINGTON, Peoria.

ELEVENTH CIRCUIT.

The counties of McLean, Livingston, Logan, Ford and Woodford.

Judges: COLOSTIN D. MYERS, Bloomington.
GEORGE W. PATTON, Pontiac.
THOMAS M. HARRIS, Lincoln.

TWELFTH CIRCUIT.

The counties of Will, Kankakee and Iroquois.

Judges: DORRANCE DIBELL, Joliet.
ARTHUR W. DESELM, Kankakee.
FRANK L. HOOPER, Watseka.

THIRTEENTH CIRCUIT.

The counties of Bureau, La Salle and Grundy.

Judges: SAMUEL C. STOUGH, Morris.
JOE A. DAVIS, Princeton.
EDGAR ELDREDGE, Ottawa.

FOURTEENTH CIRCUIT.

The counties of Rock Island, Mercer, Whiteside and Henry.

Judges: ROBERT W. OLMSTEAD, Rock Island.

FRANK D. RAMSAY, Morrison.

EMERY C. GRAVES, Geneseo.

FIFTEENTH CIRCUIT.

The counties of Jo Daviess, Stephenson, Carroll, Ogle and Lee.

Judges: RICHARD S. FARRAND, Dixon.

JAMES S. BAUME, Galena.

OSCAR E. HEARD, Freeport.

SIXTEENTH CIRCUIT.

The counties of Kane, Du Page, De Kalb and Kendall.

Judges: CLINTON F. IRWIN, Elgin.

DUANE J. CARNES, Sycamore.

MAZZINI SLUSSER, Downers Grove.

SEVENTEENTH CIRCUIT.

The counties of Winnebago, Boone, McHenry and Lake.

Judges: ARTHUR H. FROST, Rockford.

CHARLES H. DONNELLY, Woodstock.

CLAIRE C. EDWARDS, Waukegan.

(4) COURTS OF COOK COUNTY.

The State Constitution recognizes Cook county as one judicial circuit and establishes the Circuit, Criminal and Superior Courts of said county. The Criminal Court has the jurisdiction of a Circuit Court in criminal and quasi-criminal cases only, and the judges of the Circuit and Superior Courts are judges, ex officio, of the Criminal Court.

CRIMINAL COURT.

CLERK—FRANK J. WALSH, Criminal Court Building, Chicago.

CIRCUIT COURT.

CLERK—JOHN W. RAINEY, County Building, Chicago.

JUDGES.

EDWARD O. BROWN,
RICHARD S. TUTHILL,
JESSE A. BALDWIN,
FRANK BAKER,
KICKHAM SCANLAN,
THOMAS G. WINDES,
MERRITT W. PINCKNEY,

JOHN GIBBONS,
ADELOE J. PETTIT,
LOCKWOOD HONORE,
GEORGE KERSTEN,
JOHN P. MCGOETY,
FREDERICK A. SMITH,
CHARLES M. WALKER.

SUPERIOR COURT.

CLERK—RICHARD J. McGRATH, County Building, Chicago.

JUDGES.

WILLIAM H. MCSURELY,
JOHN M. O'CONNOR,
THEODORE BRENTANO,
RICHARD E. BURKE,
THOMAS C. CLARK,
WILLIAM FENIMORE COOPER,
WILLIAM E. DEVER,
MARTIN M. GRIDLEY,
CHARLES A. McDONALD,

MARCUS A. KAVANAGH,
JOSEPH H. FITCH,
HENRY V. FREEMAN,
ALBERT C. BARNES,
HUGO PAM,
M. L. MCKINLEY,
CLARENCE N. GOODWIN,
CHARLES M. FOELL,
DENNIS E. SULLIVAN.

(5) CITY COURTS.

City Courts existing prior to the Constitution of 1870 were continued until abolished by the qualified voters of the city. These courts may now be established under Sec. 21 of Chap. 37, R. S., J. & A. ¶ 3309, and when so established have jurisdiction as defined by Sec. 1 of an act entitled "An Act in relation to courts of record in cities," approved May 10, 1901, J. & A. ¶ 3289.

THE CITY COURT OF ALTON.

JAMES E. DUNNEGAN, Judge.

ALLAN G. MACDONALD, Clerk.

THE CITY COURT OF AURORA.

EDWARD M. MANGAN, Judge.

W. C. FLANNIGAN, Clerk.

THE CITY COURT OF BEARDSTOWN.

J. J. COOKE, Judge.

JOHN LISTMANN, Clerk.

THE CITY COURT OF CANTON.

H. C. MORAN, Judge.

ERNEST HIPSLEY, Clerk.

THE CITY COURT OF CENTRALIA.

ALBERT D. RODENBERG, Judge.

GUY C. LIVESAY, Clerk.

THE CITY COURT OF CHARLESTON.

CHARLES A. QUACKENBUSH, Judge.

COBA DANIELS, Clerk.

THE CITY COURT OF CHICAGO HEIGHTS.

CHARLES H. BOWLES, Judge.

EDWARD H. KIRGIS, Clerk.

THE CITY COURT OF DE KALB.

JOHN A. DOWDALL, Judge.

JOHN C. KILLIAN, Clerk.

THE CITY COURT OF DU QUOIN.

BENJAMIN W. POPE, Judge.

HARRY BARRETT, Clerk.

THE CITY COURT OF EAST ST. LOUIS.

ROBERT H. FLANNIGAN,

W. M. VANDEVENTER, Judges.

WILLIAM J. VEACH, Clerk.

THE CITY COURT OF ELGIN.

FRANK E. SHOPEN, Judge.

CHARLES S. MOTE, Clerk.

THE CITY COURT OF GRANITE CITY.

M. R. SULLIVAN, Judge.

JACK MELLON, Clerk.

THE CITY COURT OF HARRISBURG.

WM. H. PARISH, JR., Judge. HOMER WADE, Clerk.

THE CITY COURT OF HERRIN.

ROBERT T. COOK, Judge. WM. R. KEE, Clerk.

THE CITY COURT OF KEWANEE.

H. STERLING POMEROY, Judge. CHARLES L. ROWLEY, Clerk.

THE CITY COURT OF LITCHFIELD.

DAN W. MADDOX, Judge. LAURETTA SALZMAN, Clerk.

THE CITY COURT OF MACOMB.

JOSIE WESTFALL, Judge. WM. B. MARTIN, Clerk.

THE CITY COURT OF MARION.

W. O. POTTER, Judge. GEO. T. CARTER, Clerk.

THE CITY COURT OF MATTOON.

JOHN McNUTT, Judge. THOMAS M. LYTLE, Clerk.

THE CITY COURT OF MOLINE.

G. O. DIETZ, Judge. GEO. A. SCHRADER, Clerk.

THE CITY COURT OF PANA.

J. H. FORNOFF, Judge. G. W. MARSLAND, Clerk.

THE CITY COURT OF STERLING.

CARL E. SHELDON, Judge. EARL L. HESS, Clerk.

THE CITY COURT OF SPRING VALLEY.

WILLIAM HAWTHORNE, Judge. WILLIAM H. BURNELL, Clerk.

THE CITY COURT OF ZION CITY.

V. V. BARNES, Judge. O. L. SPRECHER, Clerk.

(6) MUNICIPAL COURT OF CHICAGO.

Established by Act of May 18, 1905 (L. 1905, p. 158), J. & A. 3313 et seq.

FRANK P. DANISCH, Clerk.

**CHIEF JUSTICE,
HARRY OLSON.**

ASSOCIATE JUDGES.

**HARRY M. FISHER
EDWARD T. WADE
JOHN K. PRINDIVILLE
JOSEPH P. RAFFERTY
JOHN COURTNEY
JOHN J. SULLIVAN
JOHN A. MAHONEY
WILLIAM N. GEMMILL
FRANK H. GRAHAM
DAVID SULLIVAN**

**HUGH J. KEARNS
JOSEPH S. LABUY
JOHN R. NEWCOMER
JOHN R. CAVERLY
CHAS. A. WILLIAMS
JACOB H. HOPKINS
HARRY P. DOLAN
JOSEPH SABATH
JAMES C. MARTIN
ARNOLD HEAP**

**JOHN J. ROONEY
SAMUEL H. TRUDE
JOSEPH E. RYAN
EDMUND K. JARECKI
CHARLES N. GOODNOW
PATRICK B. FLANAGAN
DENNIS W. SULLIVAN
SHERIDAN E. FRY
JOHN STELK
JOSEPH Z. UHLIR.**

(7) COUNTY AND PROBATE COURTS.

In the counties of Cook, Kane, LaSalle, Madison, Peoria, Rock Island, Sangamon, St. Clair, Vermilion and Will, each having a population of over 70,000, probate courts are established, distinct from the county courts. In the other counties the county courts have jurisdiction in all matters of probate. (Laws 1881, 72), J. & A. ¶ 3259.

JUDGES.	COUNTIES.	COUNTY SEATS.
LYMAN McCARL.....	Adams.....	Quincy.
MILES F. GILBERT.....	Alexander.....	Cairo.
WM. H. DAWDY.....	Bond.....	Greenville.
WM. C. DE WOLF.....	Bocne.....	Belvidere.
WILLARD Y. BAKER.....	Brown.....	Mt. Sterling.
JAMES R. PRICHARD.....	Bureau.....	Princeton.
JOHN DAY, JR.....	Calhoun.....	Hardin.
ARTHUR J. GRAY.....	Carroll.....	Mt. Carroll.
CHARLES Æ. MARTIN.....	Cass.....	Virginia.
ROY C. FREEMAN.....	Champaign.....	Urbana.
CHARLES A. PRATER.....	Christian.....	Taylorville.
A. L. RUFFNER.....	Clark.....	Marshall.
JOHN L. BOYLES.....	Clay.....	Louisville.
JAMES ALLEN.....	Clinton.....	Carlyle.
JOHN P. HARRAH.....	Coles.....	Charleston.
THOMAS F. SCULLY.....	Cook.....	Chicago.
HENRY HORNER, Pro. J.....	Cook.....	Chicago.
DUANE GAINES.....	Crawford.....	Robinson.
STEPHEN B. RARIDEN.....	Cumberland.....	Toledo.
WILLIAM L. POND.....	DeKalb.....	Sycamore.
FRED C. HILL.....	DeWitt.....	Clinton.
D. H. WAMSLEY.....	Douglas.....	Tuscola.
S. J. RATHJE.....	DuPage.....	Wheaton.
DANIEL V. DAYTON.....	Edgar.....	Paris.
PETER C. WALTERS.....	Edwards.....	Albion.
BARNEY OVERBECK.....	Effingham.....	Effingham.
FRED C. MEYERS.....	Fayette.....	Vandalia.
M. L. McQUISTON.....	Ford.....	Paxton.
NEALY I. GLENN.....	Franklin.....	Benton.
HOBERT S. BOYD.....	Fulton.....	Lewistown.
GEORGE L. HOUSTON.....	Gallatin.....	Shawneetown.
THOMAS HENSHAW.....	Greene.....	Carrollton.
GEORGE BEDFORD.....	Grundy.....	Morris.
J. S. SNEED.....	Hamilton.....	McLeansboro.
E. W. DUNHAM.....	Hancock.....	Carthage.
HENRY M. WINDERS.....	Hardin.....	Elizabethtown.
RUFUS F. ROBINSON.....	Henderson.....	Oquawka.
LEONARD E. TELLEEN.....	Henry.....	Cambridge.
JOHN H. GILLAN.....	Iroquois.....	Watseka.
WILLARD F. ELLIS.....	Jackson.....	Murphysboro.
HARRY C. DAVIDSON.....	Jasper.....	Newton.
ANDREW D. WEBB.....	Jefferson.....	Mt. Vernon.
HARRY W. POGUE.....	Jersey.....	Jerseyville.
F. J. CAMPBELL.....	Jo Daviess.....	Galena.
J. F. HIGHT.....	Johnson.....	Vienna.
S. N. HOOVER.....	Kane.....	Geneva.
JOHN H. WILLIAMS, Pro. J....	Kane.....	Geneva.
JAY H. MERRILL.....	Kankakee.....	Kankakee.
CLARENCE S. WILLIAMS.....	Kendall.....	Galesburg.
R. C. RICE.....	Knox.....	Yorkville.
PERRY L. PERSONS.....	Lake.....	Waukegan.
HENRY MAYO.....	La Salle.....	Ottawa.

JUDGES.	COUNTIES.	COUNTY SEATS.
ALBERT T. LARDIN, Pro. J....	La Salle.....	Ottawa.
OTTO W. LONGNECKER.....	Lawrence.....	Lawrenceville.
JOHN B. CRABTREE.....	Lee.....	Dixon.
B. R. THOMPSON.....	Livingston.....	Pontiac.
CHARLES J. GEHLBACH.....	Logan.....	Lincoln.
JOHN H. MCCOY.....	Macon.....	Decatur.
ANDREW J. DUGGAN.....	Macoupin.....	Carlinville.
H. B. EATON.....	Madison.....	Edwardsville.
JOSEPH P. STREUBER, Pro. J....	Madison.....	Edwardsville.
WILLIAM G. WILSON.....	Marion.....	Salem.
DANIEL H. GREGG.....	Marshall.....	Lacon.
JAMES A. MCCOMAS.....	Mason.....	Havana.
LANNES P. OAKES.....	Massac.....	Metropolis.
CHARLES I. IMES.....	McDonough.....	Macomb.
DAVID T. SMILEY.....	McHenry.....	Woodstock.
JAMES C. RILEY.....	McLean.....	Bloomington.
JESSE M. OTT.....	Menard.....	Petersburg.
F. L. CHURCH.....	Mercer.....	Aledo.
HENRY SCHNEIDER.....	Monroe.....	Waterloo.
T. J. MCDAVID.....	Montgomery.....	Hillsboro.
WM. E. THOMSON.....	Morgan.....	Jacksonville.
JOHN T. GRIDER.....	Moultrie.....	Sullivan.
FRANK E. REED.....	Ogle.....	Oregon.
CLYDE E. STONE.....	Peoria.....	Peoria.
WALTER A. CLINCH, Pro. J....	Peoria.....	Peoria.
LOUIS R. KELLY.....	Perry.....	Pinckneyville.
WM. A. DOSS.....	Platt.....	Monticello.
PAUL F. GROTE.....	Pike.....	Pittsfield.
BENJ. F. ANDERSON.....	Pope.....	Golconda.
FRED HOOD.....	Pulaski.....	Mound City.
IRVING E. BROADDUS.....	Putnam.....	Hennepin.
WM. M. SCHUWERK.....	Randolph.....	Chester.
ROB'T B. WITCHER.....	Richland.....	Olney.
NELS A. LARSON.....	Rock Island.....	Rock Island.
BENJ. S. BELL, Pro. J.....	Rock Island.....	Rock Island.
CHAS. D. STILWELL.....	Saline.....	Harrisburg.
JOHN B. WEAVER.....	Sangamon.....	Springfield.
C. H. JENKINS, Pro. J.....	Sangamon.....	Springfield.
JOHN C. WOBK.....	Schuyler.....	Rushville.
F. C. FUNK.....	Scott.....	Winchester.
A. J. STEIDLEY.....	Shelby.....	Shelbyville.
FRANK THOMAS.....	Stark.....	Toulon.
JOSEPH B. MESSICK.....	St. Clair.....	Belleville.
FRANK PERRIN, Pro. J.....	St. Clair.....	Belleville.
ROSCOE J. CARNAHAN.....	Stephenson.....	Freeport.
JAMES M. RAHN.....	Tazewell.....	Pekin.
MONROE C. CRAWFORD.....	Union.....	Jonesboro.
LAWRENCE T. ALLEN.....	Vermilion.....	Danville.
W. J. BOOKWALTER, Pro. J....	Vermilion.....	Danville.
W. S. WILLHITE.....	Wabash.....	Mt. Carmel.
L. E. MURPHY.....	Warren.....	Monmouth.
W. P. GREEN.....	Washington.....	Nashville.
J. V. HEIDINGER.....	Wayne.....	Fairfield.
J. M. ENDICOTT.....	White.....	Carmi.
WM. A. BLODGETT.....	Whiteside.....	Morrison.
GEORGE J. COWING.....	Will.....	Joliet.
JOHN B. FITHIAN, Pro. J....	Will.....	Joliet.
W. F. SLATER.....	Williamson.....	Marion.
LOUIS M. RECKHOW.....	Winnebago.....	Rockford.
ARTHUR C. FORT.....	Woodford.....	Eureka.

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The following table shows the Appellate Court cases reported in this volume in which certiorari has been applied for and denied, thus making the opinion of the Supreme Court final. (See Practice Act, sec. 121, J. & A. ¶ 8658.)

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CASES
DETERMINED IN THE
FIRST DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS

DURING THE YEAR 1914

C. H. Wayne, Appellant, v. E. W. Wagner et al., trading as E. W. Wagner & Company, Appellees.

Gen. No. 20,163.

1. **BOARDS OF TRADE AND EXCHANGES, § 29***—*liability of broker in purchasing grain for delivery.* Where a customer through his commission firm made "short" sale of 20,000 bushels of corn for September delivery and directed the latter to buy on the board for delivery and the firm on September 30th bought for such customer and other customers for 73½ cents per bushel, and on the next day, October 1st, purchased 20,000 bushels of corn for 70 cents per bushel for delivery on that day for another party, *held* that the customer was not entitled to recover from the firm the difference of 3½ cents per bushel for the reason that the making of the latter purchase was not a transaction in which the firm was acting as agent for him.

2. **BOARDS OF TRADE AND EXCHANGES, § 29***—*when broker not liable for excessive price paid in purchasing grain for delivery.* Where a person sold "short" a certain number of bushels of corn deliverable on a certain day, and on that day sent a telegram to his commission firm that he would not order the corn bought for delivery which was received by the firm until two minutes before the close of the market for the day, and the firm then bought the grain for delivery at from 46½ to 45½ cents and the market closed at 45⅝ to 45½ cents, *held* that the customer was not entitled to recover

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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from the firm the difference between the price paid and the closing price for the reason that he had given no order to buy and for the further reason that the firm could not be expected to buy at the closing price.

3. GAMING, § 30*—*persons not liable in gambling transaction.* Where a firm at the request of one of its patrons paid out money on his order, and to be charged to his account, to another for the purpose of placing the same on an election bet, the patron is not entitled to recover the sum from the firm on the theory that the transaction was illegal, it appearing that the firm never aided or abetted him in making the bet and that the firm and the person to whom the money was paid were his agents.

Appeal from the Municipal Court of Chicago; the Hon. OSCAR M. TORRISON, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed November 30, 1914.

CHARLES A. BUTLER, for appellant; FRANKLIN RABER, of counsel.

CHESTER ARTHUR LEGG, for appellees.

MR. JUSTICE BAKER delivered the opinion of the court.

The defendants below, appellees here, are commission merchants on the Chicago Board of Trade under the firm name of E. W. Wagner & Company, and had a branch office at Rock Island. Plaintiff Wayne was a customer of Wagner & Company and transacted business with them through their Rock Island office. The claims sued on in this case grew out of three separate and independent transactions, each depending on its own circumstances, and they will therefore be considered separately.

I.

THE CLAIM FOR \$700 ON THE TRANSACTIONS OF SEPTEMBER 30 AND OCTOBER 1, 1912.

Wayne had sold "short" through Wagner & Company 20,000 bushels of corn for September delivery. This corn Wagner & Company must deliver September 30th or "default." Wayne ordered Wagner &

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Company to buy on the Board 20,000 bushels of corn September 30th to deliver on his "short" sales. Other customers of Wagner & Company were short of corn and Wagner & Company bought before the close of "Change" September 30th, 70,000 bushels of cash corn at 73½ cents, supposing that amount was all they required to fill their contracts. It turned out that they required 20,000 bushels more and Slaughter & Company offered to sell them that quantity for immediate delivery if they would sell to Slaughter & Company the same quantity at the same price, deliverable the following day. This offer was accepted and the purchase and sale made as proposed. Wagner & Company then, on September 30th, delivered the corn they had sold for September delivery for Wayne and advised him by telegraph the same day that they had bought for him 20,000 bushels of September corn at 73½ cents and delivered the same. The result of the transactions in question was to leave Wagner & Company "short" 20,000 bushels of corn deliverable October 1st. The price of corn for immediate delivery declined to 70 cents per bushel on the morning of October 1st, and at that price Wagner & Company bought 20,000 bushels to deliver on their sale of the day before to Slaughter & Company.

The claim of Wayne is that he was entitled to \$700, the difference between 73½ cents, the price at which Wagner & Company sold the 20,000 bushels to Slaughter & Company, and 70 cents, the price at which they bought October 1st the corn to deliver on that sale.

We think the learned judge of the Municipal Court properly decided that Wayne was not entitled to recover the amount of such difference from Wagner & Company. When Wagner & Company bought the corn pursuant to his order at 73½ cents and delivered the same on his "short" sale, they had done all that he ordered them to do. If in order to buy the 20,000 bushels of corn for him they sold a like amount de-

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liverable the next day, that transaction was not one in which they acted as the agents of Wayne, but one in which they and they alone took a risk. If corn had advanced $3\frac{1}{2}$ cents, they would have been compelled, to avoid default, to buy the corn at that price, and as in that case the loss would have been theirs, we think that in the instant case the profit was theirs.

II.

THE CLAIM FOR \$806.25 ON TRANSACTIONS OF DECEMBER 31, 1912.

December 31, 1912, Wayne was "short" 190,000 bushels of corn deliverable that day. He early in the day expressed to the manager of Wagner & Company's Rock Island office the belief that it was not necessary for him to buy in his "short" corn. He conceived the idea that if he failed to deliver he had a right to settle at the closing price. Wagner telegraphed him, as the fact was, that the rules did not so provide; that the settlement would be made on the value of the corn as ascertained by a committee of the Board, to which would be added damages of five or ten per cent. Wayne telegraphed that he would not order the corn bought. This telegram was received at 1:13 P. M., two minutes before the close of the market for the day, and Wagner & Company proceeded to buy the corn at from $46\frac{1}{2}$ to $45\frac{1}{2}$ cents. The market closed at 1:15 P. M. at $45\frac{5}{8}$ to $45\frac{1}{2}$ cents.

Wagner's claim is that he was entitled to the difference between $45\frac{1}{2}$ cents, the closing price, and the price paid by Wagner & Company for the corn. Clearly, Wayne was not entitled to recover on the ground that he had given an order to buy at the closing price, first, because he gave no such order; and second, because no one could tell in advance who would make the very last sale nor what the closing price would be. We think that when Wagner & Company began to buy the corn only two minutes before the

close of the market and bought 190,000 bushels, not *en bloc*, but from different brokers at different prices, they made diligent effort to buy at the closing price.

Wayne had no right, by refusing to give the order to buy, to compel Wagner & Company to default and pay the price and damages fixed by a committee of the Board. If he wished them to default on his sales, he should have given them positive orders to do so, and then he would have been liable to pay the price and damages fixed by a committee of the Board. In this case the minimum damages of five per cent. in case of default would have amounted to more than \$4,000, and Wayne could not, by merely refusing to give orders to buy, compel the defendant to default and thereby become liable for such damages.

We think the court properly found for the defendants on this claim for damages, because they, at the time and under the circumstances stated, bought in the 190,000 bushels of corn they had sold "short" on the order of the plaintiff.

III.

THE PLAINTIFF IS NOT ENTITLED TO RECOVER OF THE DEFENDANTS THE \$300 WHICH THEY, ON HIS ORDER, PAID TO LEDSWORTH TO BET ON THE PRESIDENTIAL ELECTION OF 1912.

November 4, 1912, the day before the election, McCormick, the manager of the Rock Island office of defendants, at plaintiff's request telegraphed Ledsworth, the chief telegrapher of defendants at Chicago, inquiring whether he could place bets of 3 to 1 on Wilson in Chicago, and was informed that he could, and McCormick so reported to plaintiff. Plaintiff then directed McCormick to wire C. A. Johnson, general manager of defendants, to hand \$300 to Ledsworth and charge same to his account. Johnson did so and plaintiff now claims that defendants should pay to him the amount handed to Ledsworth. Whether Ledsworth in fact bet the money so handed to him does not ap-

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pear, nor is it, in our opinion, material to inquire. There is no pretense that he bet the money with defendants nor that they had anything to do with the transaction except to hand Wayne's money over to Ledsworth, knowing that he had directed Ledsworth to bet the same with some third person. Under our statute a "loser" may recover from a "winner" money won in gambling, but the money in question was not "won" by the defendants. The defendants did not aid or abet the plaintiff to bet on the election. They only paid his money on his order to Ledsworth, and we know of no case which holds that money so paid can be recovered by the person ordering it paid from the person paying it. In carrying out the orders of the plaintiff, McCormick and Ledsworth were not acting as agents of the defendants or in the course of their duty as defendants' employees, but as agents for and under the express directions of the plaintiff.

We think the court properly held that the plaintiff was not entitled to recover the money so paid.

We think that on the entire case the judgment is right and it is affirmed.

Affirmed.

**John F. Devine, Administrator, Defendant in Error,
v. W. G. Johnson, Receiver, Plaintiff in Error.**

Gen. No. 20,174. (Not to be reported in full.)

Error to the Circuit Court of Cook county; the Hon. JOHN A. DOWDALL, Judge, presiding. Heard in this court at the March term, 1914. Reversed with finding of fact. Opinion filed November 30, 1914.

Statement of the Case.

Action by John F. Devine suing as administrator of the estate of John William Tullock, deceased, against W. O. Johnson, receiver of the Chicago & Milwaukee Electric Railroad Company, for damages resulting from the death of the plaintiff's intestate through being struck by defendant's car. From a judgment for Ten Thousand Dollars in favor of the administrator of the estate, defendant appeals.

The tracks of the railroad company at Highland Park were laid on top of an embankment fifteen to twenty feet above the level of the street on which deceased approached the tracks.

A regular car ran south at 7:40 p. m., which did not stop at the Morain Road station except to discharge passengers, or when there were persons on the platform who indicated a wish to take the car. The deceased, with three companions, approached the tracks on the walk alongside of the Morain Road. That the car was in plain sight before the deceased reached the steps leading to the top of the embankment was proved by the testimony of his three companions, who were called as witnesses by the plaintiff. Marshall, the leader, testified that he saw the car when it was half a mile away, that its lights were lit, and after he saw it he walked up the stairs. Gilbert Halcrow testified that he saw the car when it was three hundred feet away, and John Halcrow testified that when he and deceased were below the stairs he said to deceased: "I wonder if we will catch that car," and deceased answered: "Sure we will." From the top of the stairs a walk led to the south end of the east platform, and from the center of that platform at a point about seventy-five feet north of the top of the stairs a walk led across the tracks to the west platform. The deceased and his companions attempted to cross the tracks at an angle going northwesterly. The other three men crossed the west track safely, but the deceased in attempting to cross it a few feet south of

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the south end of the platform was struck by the car and killed.

BULL & JOHNSON, for plaintiff in error.

DANIEL A. LEVY, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. RAILROADS, § 678*—*when crossing track in front of approaching car constitutes contributory negligence.* Where decedent was struck by an electric suburban car while attempting to cross the track in front of the car, which he knew to be coming and there was no obstruction to his view nor necessity for making the attempt, he was *held* not to have been in the exercise of ordinary care at the time of his death.

2. RAILROADS, § 678*—*effect of error of judgment in crossing tracks.* Where a pedestrian in attempting to reach a car misjudges his ability to cross in front of such approaching suburban electric car and is run down, no one besides himself can be held responsible for his error of judgment, through which he loses his life.

Raymond C. Thayer, Appellee, v. Niobie G. Thayer, Appellant.

Gen. No. 20,199.

DIVORCE, § 168*—*how decree effects property rights.* Where, in a divorce suit, the parties entered into an agreement, approved by the court in its decree, that the wife should have all the personal property and she should pay the husband fifteen hundred dollars for his interest in certain real estate, for which she gave her notes, secured by a trust deed on the property, the decree fixing their property rights was *held* binding in a suit to foreclose the trust deed, when she refused to pay certain of the unpaid notes and re-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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pudiated the notes and trust deed as arising out of an illegal transaction.

Appeal from the Superior Court of Cook county; the Hon. MAZZINI SLUSSEK, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed November 30, 1914. *Certiorari* denied by Supreme Court (making opinion final).

J. MARION MILLER, for appellant.

THEODORE JOHNSON, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

This is an appeal by the defendant from a decree of foreclosure of a trust deed in the nature of a mortgage given by her to secure a series of notes amounting to fifteen hundred dollars made, indorsed and delivered by her to the complainant October 22, 1910. May 26, 1903, the parties, then being husband and wife, purchased the mortgaged premises and the same was conveyed to defendant. The purchaser assumed a prior mortgage of three thousand five hundred dollars, paid two hundred dollars cash and for the remainder gave a series of notes secured by second mortgage. February 10, 1910, Mrs. Thayer filed her bill in the Circuit Court praying for a divorce on the ground of cruelty, and therein alleged that her husband had put into the said premises eight hundred dollars, but alleged that he had the use of a part of said premises and collected rent on the remainder, which use of the premises and rent collected more than set off any money put into said premises by him, and she prayed that she might be decreed to be the sole owner of said premises. The defendant answered the bill, denying the charge of cruelty and claiming an equal interest with complainant in said premises. When the cause was reached for hearing before Judge Tuthill, complainant's solicitor told the judge that the parties had agreed that the complainant should

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have all of the personal property and should pay defendant one thousand five hundred dollars for his interest in said real estate. The decree in that case finds the defendant guilty of cruelty as charged in the bill and further finds that the defendant had contributed towards the purchase of said real estate one thousand five hundred dollars, and after disposing of the personal property decrees that complainant give to defendant thirty notes for fifty dollars each, payable monthly for thirty consecutive months, and a trust deed conveying said real estate to secure said notes. By an amendment to the bill in this case complainant set up the facts above stated. Mrs. Thayer made the notes and trust deed she was directed by the decree to make and paid the first eleven notes as they fell due, but refused to pay the remainder and insists that the notes and trust deed grew out of an illegal transaction and therefore cannot be enforced.

The agreement of the parties in the divorce suit related only to the interest that the defendant claimed in the real estate in question. He claimed to have an equitable one-half interest therein and she claimed that although he had contributed eight hundred dollars towards its purchase he had been repaid the money contributed. Both parties were represented by counsel, and when an agreement was reached it was stated to the court and was approved by the court in and by its decree in the divorce suit.

We think that the decree entered under such circumstances is binding on the parties. 2 Bishop on Marriage and Divorce, sec. 702; *Storey v. Storey*, 125 Ill. 608; *Buck v. Buck*, 60 Ill. 241; *Henderson v. Henderson*, 37 Ore. 141.

The record is, in our opinion, free from error and the decree is affirmed.

Affirmed.

**Orthwein Matchette Company, Defendant in Error, v.
Finley Barrell et al., trading as Finley Barrell &
Company, Plaintiffs in Error.**

Gen. No. 20,282. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed November 30, 1914.

Statement of the Case.

Action by Orthwein Matchette Company, a corporation, against Finley Barrell, Eugene R. Pike and William E. White, copartners, trading as Finley Barrell & Company, to recover a sum alleged to be due the plaintiff under a written contract relating to an arrangement whereby the defendants agreed to install a private wire from the office of plaintiff in Kansas City to its office in Wichita, and the plaintiff agreed to send the defendants all the grain business it received from the Wichita Board of Trade except that to be executed at Kansas City. To reverse a judgment entered on a verdict in favor of plaintiff, defendants prosecute a writ of error.

CHESTER ARTHUR LEGG, for plaintiffs in error.

JAMES M. SHEEAN and MARTIN H. FOSS, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

PARTNERSHIP, § 123*—*evidence sufficient to establish agreement with.* In an action against a copartnership to recover a sum alleged to be due under a contract whereby the defendants agreed to take care of the business furnished by a Board of Trade in a certain city with which plaintiff had a contract, evidence held sufficient to warrant a finding by a jury that the defendants, through

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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one of their members, assented to the contract with reference to the conditions of the arrangement made between plaintiff and said Board of Trade so that the defendants were bound thereby, it appearing that the member was present at the time the arrangement was orally made and that the plaintiff thereafter sent a memorandum of the agreement to him for his approval, and in answer thereto he wrote to plaintiff that to his mind it covered all the points of the agreement.

**Mary Sampson, Appellee, v. Sanfrid Harmstrom et al.,
Appellants.**

Gen. No. 20,299. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. DENIS E. SULLIVAN, Judge, presiding. Heard in this court at the March term, 1914. Reversed and remanded with directions. Opinion filed November 30, 1914. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Bill by Mary Sampson against Sanfrid Harmstrom and Albert Harmstrom to rescind a transaction between the complainant and defendant Sanfrid Harmstrom on the ground that a fiduciary relation existed between said parties and that complainant was induced to enter into the transaction through his false and fraudulent representations. From a decree granting the relief prayed, defendants appeal.

JAMES G. SKINNER and C. H. SIPPEL, for appellants.

CHARLES J. O'CONNOR, R. HAROLD O'CONNOR and EDWARD C. KESLER, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. EXCHANGE OF PROPERTY, § 10*—*when party not entitled to rescission.* Where a woman, after making loans through a real estate and loan broker, entered into a contract with the broker for an exchange of real estate and gave her note secured by mortgage for

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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the difference in the value of the properties and subsequently became in arrears in making payments, whereupon the broker required her to execute to him a quitclaim deed as an equitable mortgage, *held* there was no fiduciary relation existing between the parties at the time the contract was made or the deed was given nor any ground for rescinding the same in equity.

2. BROKERS, § 6*—*relation with person making loan.* Where a mortgage banker or dealer in securities sells to a person a note secured by a mortgage, the buyer is an investor, and the relation growing out of the transaction is that of banker and customer or seller and buyer and not a fiduciary or trust relation.

3. BROKERS, § 6*—*when fiduciary relation created.* When a person intrusts money to another to invest for him and the person who is intrusted with the money selects the security and makes the investment, a trust or fiduciary relation is created.

4. BROKERS, § 6*—*when fiduciary relation not created.* The fact that a person buying a note from a loan broker paid for it with money which the broker had collected for him, and that the note and interest coupons were payable at his office and the interest was paid there and turned over to the buyer of the note, *held* not to create a trust or fiduciary relation between them.

5. BROKERS, § 6*—*when not a general agent.* An owner by listing lots with a real estate agent for sale does not make the agent the owner's general agent.

Oscar G. Lee, Appellee, v. S. E. Perlberg et al., trading
as S. E. Perlberg & Company, Appellants.

Gen No. 20,316. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JAMES C. MARTIN, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed November 30, 1914.

Statement of the Case.

Action by Oscar G. Lee against S. E. Perlberg and Carl Joseph, trading as S. E. Perlberg & Company, to recover rent. To reverse a judgment for \$1,288.48 recovered against defendants on a directed verdict, defendants appeal.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Lee v. Perlberg, 190 Ill. App. 13.

January 26, 1911, plaintiff Lee demised by written lease certain premises at Oklahoma City, Oklahoma, to one Minton for a term of five years from February 1, 1911, at a rental of \$225 per month. July 24, 1911, Minton assigned his interest in the lease to defendants by an assignment in writing indorsed thereon, containing the following provision: "We, said assignee, hereby assume and agree to make all the payments yet to be made, and perform and abide by all the covenants, conditions and provisions of the written lease, by said lessee to be performed." On the same day by an agreement in writing between plaintiff and defendants, the rent was reduced to \$200 per month. February 5, 1912, defendants assigned in writing the lease to one Fricke and, "guaranteed the performance by said assignee of all the covenants on the part of the lessee in said lease contained." Fricke took possession of the demised premises and paid the rent up to April 1, 1912. The suit was brought to recover rent at \$200 per month from April 1, 1912, to the beginning of the suit, less credits of \$186.52 and \$40.

McEWEN, WEISSENBAUGH, SHRIMSKI & MELOAN, for appellants.

F. WILLIAM KRAFT, for appellee; ROBERT N. ERSKINE, of counsel.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 416*—*when assignees' agreement to perform covenants of lease not terminated by subsequent guaranty.* Where assignees in an assignment of a lease assumed and agreed to make all payments and to perform all the covenants and took possession and later assigned the lease to another guarantying the performance of the covenants by their assignee, *held* that the execution of the guaranty by the assignees did not affect their liability under the assignment from the original lessee by which they

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Kellogg v. Hale, 190 Ill. App. 15.

assumed the obligations of the original lease, that they received possession of the premises and thereby a privity of estate with the lessor which was terminated by the assignment and transfer of possession to their assignee, but the privity of contract, their contractual liability to the lessor, was not thereby terminated.

2. GUARANTY, § 26*—*when guarantor not discharged by delay in proceeding against maker.* Mere delay in bringing suit or failure to use diligence in attempting to collect from the principal will not discharge the guarantor; to have such effect there must be a valid and binding agreement for an extension for a definite period entered into on a valid consideration.

3. APPEAL AND ERROR, § 1478*—*when admission in evidence of foreign statute not prejudicial.* Erroneous admission in evidence of a statute of another State which is only declaratory of the common-law rule in force in this State, *held* not prejudicial error.

**William T. Kellogg, Appellant, v. F. A. Hale et al.,
Appellees.**

Gen. No. 20, 333.

1. BILLS AND NOTES, § 462*—*when instruction erroneous.* In an action on a promissory note by a person claiming to be an innocent holder for value before maturity where the maker's defense was that false representations were made to him as to the consideration of the note and that there was no consideration for it, an instruction, in effect, telling the jury that plaintiff could not recover if there was no consideration for the note and there was fraud and circumvention at the time it was made, and that the burden was on the plaintiff to prove by a preponderance of the evidence every material fact of his case, *held* erroneous for the reason there was no evidence of any fraud and circumvention in procuring the note, and also for the reason that the burden was on the defendants and not the plaintiff to show that the note was without consideration and that plaintiff was not an innocent holder for value before maturity.

2. BILLS AND NOTES, § 61*—*fraud which will not invalidate.* False representations made to the maker as to the consideration, *held* not to constitute such fraud as will invalidate the note; the fraud must relate to the execution and not to the consideration on which it is based.

3. BILLS AND NOTES, § 61*—*what fraud invalidates.* Fraud which vitiates a promissory note must consist of some trick or device

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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that induces the giving of one kind of an instrument under the belief of the maker that he is giving one of a different kind.

Appeal from the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in this court at the March term, 1914. Reversed and remanded. Opinion filed November 30, 1914.

Statement by the Court. Plaintiff brought an action in the Municipal Court against defendant Hale as maker and Winchester and Loveless as indorsers of a promissory note for one thousand dollars, dated November 23, 1913, and payable four months after date. Hale in his affidavit of defense did not state that any fraud or circumvention was used in obtaining his signature, but only that false and fraudulent representations were made to him as to the consideration for the note, and that in fact there was no consideration for it. The court instructed the jury that the plaintiff claimed that he was an innocent holder before maturity for a valuable consideration; "that this meant that he was a purchaser of the note before due for a valuable consideration, and with no knowledge of any defect in the title or any want of consideration or of any fraud in the transaction prior to the purchase; * * * that plaintiff was not entitled to recover if they believed from the evidence that the note was given without any consideration, and that there was fraud and circumvention at the time the note was made; * * * that the burden of proof was on the plaintiff and he must show by a preponderance of the evidence every material part of his case." The jury found the issues for the defendants. Plaintiff's motion for a new trial was denied and from a judgment of *nil capiat* the plaintiff prosecutes this appeal.

CAVENDER, KAISER & WERMUTH, for appellant.

BEACH & BEACH, for appellee.

Fellows-Kimbrough v. Chicago City Ry. Co., 190 Ill. App. 17.

MR. JUSTICE BAKER delivered the opinion of the court.

There is in the record no evidence of any fraud or circumvention in obtaining defendant to make the note. He knew that he was making a promissory note and only claims that false representations were made to him as to the consideration of the note, and that in fact it was given without consideration. Fraud must relate to the execution of the note and not to the consideration on which it is based. The fraud must consist of some trick or device that induces the giving of one kind of an instrument under the belief of the maker that he is giving one of a different kind. *Gray v. Goode*, 72 Ill. App. 504.

The burden was on the defendants to show that the note was without consideration and that plaintiff was not an innocent holder thereof for value and before maturity.

The giving of the instructions above quoted constitute reversible error, and for such error the judgment is reversed and the cause remanded.

Reversed and remanded.

Marie A. Fellows-Kimbrough, Appellee, v. Chicago City Railway Company, Appellant.

Gen. No. 19,836. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CHARLES A. McDONALD, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed November 30, 1914.

Statement of the Case.

Action by Marie A. Fellows-Kimbrough against Chicago City Railway Company for personal injuries sus-

Fellows-Kimbrough v. Chicago City Ry. Co., 190 Ill. App. 17.

tained by plaintiff in a collision between street cars. To reverse a judgment entered on a verdict in favor of plaintiff for thirty-seven hundred and fifty dollars, defendant appeals.

The facts relating to the accident are as follows: Thirty-fifth street in Chicago runs east and west, and Indiana avenue north and south, and where they intersect the street car lines of the defendant cross each other at right angles. On the day of the accident plaintiff was riding on an eastbound Thirty-fifth street car. As it was crossing Indiana avenue a car coming from the south on Indiana avenue did not stop to permit the Thirty-fifth street car to pass safely but ran into it knocking it partly off the track. Defendant conceded that under the circumstances the Indiana avenue car should have stopped at the south cross walk and have permitted the Thirty-fifth street car to make the crossing with safety. The explanation of this failure to stop was that although the motorman on the Indiana avenue car attempted to stop it at the usual place by turning the controller handle, which would shut off the electrical power, his attempts were unavailing by reason of a defect in the mechanism in the controller box. The particular defect is said to have been that one of the "fingers" which are fastened to the "terminals" in the controller box was bent so as to prevent the turning of the controller handle. It also appeared there was another device connected with the car called a canopy switch which might have been used by the motorman to stop the car in case the controller failed to work. It was located over the head of the motorman and one of its purposes was automatically to turn off the electric power when there is an overload of electric current. It could also be operated by turning a switch handle which shut off the power when for any reason the mechanism of the controller box failed to turn off the current. This device was the means by which the motorman finally brought the car to a stop.

Fellows-Kimbrough v. Chicago City Ry. Co., 190 Ill. App. 17.

CHARLES LE ROY BROWN, for appellant; LEONARD A. BUSBY and JOHN E. KEHOE, of counsel.

HARVEY E. WYNEKOOP and EDWARD MAHER, for appellee; GUERIN & BARRETT, of counsel.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. CARRIERS, § 381*—*sufficiency of evidence to show negligence of motorman in failing to avert collision.* In an action against a street railway company for personal injuries received by plaintiff in a collision between a street car on which she was a passenger and another car at a street intersection, where the defense was that the motorman on the latter car was unable to stop his car by reason of a defect in the mechanism of the controller box, a verdict for plaintiff *held* sustained by the evidence, there being evidence to show that the motorman could have stopped his car had he turned a canopy switch connected with the car and used for the purpose of turning off the electric power.

2. DAMAGES, § 115*—*when verdict for personal injuries not excessive.* A verdict for thirty-seven hundred and fifty dollars for personal injuries to a woman *held* not excessive, where it appeared she received bruises on her body, arms and legs and a fracture of one or two ribs and that she suffered from traumatic neurasthenia, and it also appeared that previous to the accident she was in robust health, and a physician in active practice earning two hundred dollars per month.

3. APPEAL AND ERROR, § 1514*—*when improper remarks of counsel not reversible error.* Improper remarks of plaintiff's counsel in his address to the jury *held* not so prejudicial as to require reversal, where it appeared that the statements made were such as reacted against the plaintiff rather than to the disadvantage of defendant.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. Zentschell, 190 Ill. App. 20.

**The People of the State of Illinois, Plaintiff in Error,
v. Albert Zentschell, Defendant in Error.**

Gen. Nos. 20,022-20,033.

1. APPEAL AND ERROR, § 1669*—*when irregularity in perfecting appeal waived.* Where there are irregularities in perfecting appeals from a justice court to the Criminal Court, in that the bonds were not filed and approved by the same officer, or were not filed within the statutory time, the irregularities may be considered waived by the parties appearing in court and proceeding to dispose of the causes without objection.

2. APPEAL AND ERROR, § 788*—*burden of preserving matters for review.* The burden is upon a plaintiff in error to preserve for review the matters before the trial court, and the failure to do so is not cured by attempting, even with success, to show the weakness of the various considerations which may or may not have been presented to the lower court and moved it to its conclusions.

3. APPEAL AND ERROR, § 1318*—*when order dismissing appeal presumed justified.* On writ of error to reverse an order dismissing an appeal from a justice court, it will be presumed there were sufficient matters presented to the court to justify the order, in the absence of a bill of exceptions.

Error to the Criminal Court of Cook county; the Hon. RICHARD E. BURKE, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed November 30, 1914.

MACLAY HOYNE, for plaintiff in error; LLOYD C. WHITMAN, of counsel.

FELIX J. STREYCKMANS, for defendant in error.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Twelve cases of *The People v. Zentschell*, bearing the above numbers and pending in this court on writs of error to the Criminal Court, have been ordered consolidated for hearing, and the judgment of this court will be entered in each of said cases.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The cases were begun before a justice of the peace, and in each plaintiff claimed of defendant a penalty for the violation of a section of the statute providing for the creation of anti-saloon territory. Hurd's Ill. St. 1913, ch. 43, p. 1025 (J. & A. ¶¶ 4648, 4650-4652.) Upon the trial defendant was adjudged guilty and fined. Within twenty days thereafter appeal bonds in all the cases were approved by the justice but not filed with him. In ten of the cases the bonds were filed with the clerk of the Criminal Court within twenty days, and in two of the cases within twenty-one days, after the entry of the judgments. On October 14, 1912, the defendant moved in the Criminal Court to dismiss the suits and, as the record has it, by "express consent and agreement of said parties hereto by their respective attorneys now here given and made in open court," it was ordered that "this cause" be continued to October 19th. No order appears to have been made on October 19th, but on November 16th in six of the cases, and on December 7th in the remaining cases, the following was entered by the court: "This day come the said parties hereto by their respective attorneys. And on motion of counsel for said appellant, it is ordered by the court that this cause be and the same is hereby dismissed out of this court, without costs, and that the said defendant go hereof without day."

Plaintiff contends in this court that the entry of these orders of dismissal was erroneous and that the judgments should be reversed. It is suggested but not argued by the plaintiff that there were certain irregularities in perfecting the appeals from the justice court to the Criminal Court, in that the bonds were not filed and approved by the same officer, either the justice or the clerk of the Criminal Court, and in two cases were not filed within the statutory time. We are of the opinion that where, as is the case here, both parties appear in court and proceed to dispose of the cause without objection, such irregularities, if any,

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will be considered waived. *Jarrett v. Phillips*, 90 Ill. 237; *Gallimore v. Dazey*, 12 Ill. 143; *Rago v. Veneziano*, 155 Ill. App. 557. These points cannot be raised for the first time in this court. *Beardsley v. Hill*, 61 Ill. 354.

It is urged by the plaintiff that the jurisdiction of the justice should not have been determined by the Criminal Court from the process issued by the justice or from the record made by the justice, but that it should have been determined from the evidence upon a trial of the cases *de novo* in the Criminal Court. To this the defendant replies that as there is no bill of exceptions before us, it cannot be said that the Criminal Court determined the question of the jurisdiction of the justice, and furthermore that, in the absence of a bill of exceptions showing the contrary, it will be presumed on appeal that the order of dismissal was properly entered. There is no doubt that this is in accord with the general rule. *People ex rel. Mouschenrose v. Drainage Com'rs Big Lake Spec. Drain. Dist.*, 156 Ill. 614; *Mullen v. People*, 138 Ill. 606; *Blair v. Ray*, 103 Ill. 615. It sufficiently appears from the record that something was presented to the trial court which led it to rule favorably on defendant's motion to dismiss the cases. Respective counsel say there were matters considered by the court on the motion, but they do not agree, at least in argument, as to what these matters were, and without a bill of exceptions we cannot know. In such a situation we fail to see any reason why the ordinary rule should not prevail, and we must therefore presume the sufficiency of the matters presented to justify the orders of dismissal.

Proceeding upon the assumption that the court dismissed the cases before trial because of its conclusion that the justice had no jurisdiction, plaintiff, by argument and citations, maintains that this could not properly be done. It seems to us, however, that even if it should be conceded that such a course was erroneous

plaintiff would not thereby be aided, for as we must presume some justifiable ground for the action of the court, it would follow that the ground attacked by plaintiff could not be the ground which moved the court to its conclusion.

Plaintiff would seem to assert that because we cannot say from the law record what was before the court which moved it to dismiss the cases we must conclude that its action was erroneous. As held in the cases cited above, the correct rule is just the reverse of this. The burden was upon plaintiff in error properly to preserve for review the matters before the trial court, and the failure to do this is not cured by attempting, even with success, to show the weakness of the various considerations which may or may not have been presented to the court and moved it to its conclusion. In the absence of a bill of exceptions we cannot say that there was error in the orders of the court, and the judgments are affirmed.

Affirmed.

**Von Platen & Dick Company, Plaintiff in Error, v.
Chicago Veneered Door Company, Defendant in
Error.**

Gen. No. 20,168. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed November 30, 1914.

Statement of the Case.

Action by Von Platen & Dick Company, a corporation, against Chicago Veneered Door Company, a corporation, upon a claim for damages arising out of purchase of doors from defendant. Defendant filed a

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set-off claiming a balance due on his sale of doors to plaintiff. The trial court found that the plaintiff was not entitled to recover and directed a verdict in favor of the defendant for the amount of its set-off. From a judgment in favor of the defendant, plaintiff brings error.

ROBERT W. DUNN, for plaintiff in error.

FRED H. ATWOOD, FRANK B. PEASE, CHARLES O. LOUCKS and VERNON R. LOUCKS, for defendant in error.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 138*—*when buyer not entitled to damages for non-delivery.* In an action to recover an excess of costs to plaintiff over an alleged contract price at which defendant had agreed to furnish certain doors, where it appeared that plaintiff would not agree to pay for the doors, but only to give defendant credit on an alleged claim arising out of another sale, the plaintiff was not entitled to its claim for damages for defendant's refusal to deliver, since there is no rule of law which requires a seller to deliver goods to a buyer where the buyer before delivery has notified the seller that he will not pay for them.

2. SALES, § 97*—*when buyer must reject goods for breach of contract as to quality or description.* Where goods are not of the quality or description ordered, a purchaser should reject them within a reasonable time and not appropriate them to his own use.

3. SALES, § 401*—*when evidence insufficient to charge seller for work done on goods sold.* Where a plaintiff attempted to charge a defendant with the cost for labor, etc., in sandpapering and putting in condition, agreed upon, a lot of doors sold and delivered by defendant to plaintiff, it appeared that plaintiff had the doors for about eight months without making any complaint concerning their condition, and the testimony tended to show that the exposure of the doors during such winter months would roughen them, the evidence was insufficient to charge defendant with the expense of removing the roughness in question, caused by the plaintiff's own act.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Short v. Oregon Short Line R. Co., 190 Ill. App. 25.

4. SALES, § 329*—*when evidence justifies a directed verdict for seller.* Where the trial court was properly of the opinion that plaintiff was not entitled to credits claimed, and the items of amounts, dates of delivery and prices of defendant's statement of set-off were not in dispute, it did not err in directing a verdict for the amount of the defendant's set-off, the correctness of the set-off being admitted under the pleadings in the case and the testimony of the opposite party.

P. E. Short, Appellee, v. Oregon Short Line Railroad Company, Appellant.

Gen. No. 20,229. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. JAMES C. MARTIN, Judge, presiding. Heard in this court at the March term, 1914. Reversed with finding of fact. Opinion filed November 30, 1914.

Statement of the Case.

Action by P. E. Short against Oregon Short Line Railroad Company to recover damages caused by the death of a number of sheep belonging to plaintiff at a stopping point for feeding during transportation from Wyoming to Chicago. It was claimed that the sheep died from eating poisonous weeds in the pasture furnished by the defendant, and the negligence alleged and sought to be proved was the furnishing of the kind of pasturing in which they were placed. From a judgment in a certain sum, in favor of the plaintiff, defendant appeals.

The entire shipment numbered 1,996 head of sheep. Grand Island, Nebraska, the place in question, was the third feeding point from the initial point of shipment. The sheep arrived there in good condition about 4 P. M., June 23, 1909, were unloaded and placed in a pasture. On the following morning 133 of the sheep were found

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Short v. Oregon Short Line R. Co., 190 Ill. App. 25.

to be dead, or nearly so, were badly bloated and frothing from the mouth and nose. The remaining sheep were in bad condition, and 29 of them died after leaving Grand Island.

The evidence showed that the pasture in question was part of the Grand Island stock yards, containing 1,500 acres of pasturage, divided into 25 different inclosures by wire fences. There were 25 acres in this particular pasture field, which is called No. 104, and there was ample room and pasturage for several times the number of sheep placed therein on this occasion. The vegetation in this pasture field was similar to that in all the other pastures, all of which had been broken up and sowed in the fall and winter of 1906 and 1907 in Kentucky blue grass, English blue grass and other grasses of a kind usually furnished for feeding. Most of the pasture was in blue grass and there was a sprinkling of some common weeds, like the smart weed, pig weed, etc., but weeds were very scarce. The vegetation in general was luxuriant and adapted to the proper feeding of sheep. It had been used for this purpose for the two previous years. Many thousand head of sheep and also many horses grazed in the pasture during the summer of this occurrence. The horses were not affected in any way, and while some of the sheep died, yet the number was less than the normal death rate of sheep.

JOHN A. SHEEAN, for appellant.

CHARLES A. BUTLER, for appellee; FRANKLIN RABER, of counsel.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Maywood Trust & Savings Bank v. Marshall, 190 Ill. App. 27.

Abstract of the Decision.

1. CARRIERS, § 237*—*when not liable for loss resulting from pasturing sheep en route.* Where it appeared that the owner of sheep was traveling with the shipment and that he was an experienced sheep man, knowing their habits and results of feeding, and he saw the pasture in question in daylight and made suggestions about it and knew its character, it was *held*, if there was any negligence in connection with the duration of the period of feeding, the shipper and owner was guilty of such contributory negligence as would bar a recovery for loss of sheep due from negligence in placing them in a rich pasture and permitting them to overeat.

2. CARRIERS, § 235*—*when not negligent in providing pasture for sheep.* In an action to recover damages for loss of sheep through eating in a pasture furnished by a defendant carrier, the evidence is *held* to fail to show in the pasture anything which, in itself, was harmful for sheep to eat and to charge defendant with negligence with reference to the kind of pasture furnished.

Maywood Trust & Savings Bank, Appellee, v. Margaret B. Marshall, Appellant.

Gen. No. 20,265. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. ADELOR J. PETT, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed November 30, 1914.

Statement of the Case.

Trial of right of property by Margaret B. Marshall against Maywood Trust & Savings Bank, which held the property under a writ of attachment. In the justice court a decision was entered adverse to plaintiff, when she took an appeal to the Circuit Court. From a finding in favor of the attaching creditor, plaintiff appeals.

The only testimony was that of defendant, who testified concerning the transaction of the chattel mort-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Maywood Trust & Savings Bank v. Marshall, 190 Ill. App. 27.

gage from Hiram Brown and wife; in the mortgage the furniture was described as in apartment "D-1, 404 South Ashland Blvd., Chicago, Cook County, Illinois." Subsequently the Browns left this apartment and went away. It was not known where. Plaintiff afterwards received a writing signed by Hiram Brown, addressed: "To whom it may concern," purporting to give authority to "Messrs. Marshall & Co." to gain possession of such furniture "as they are entitled to under the terms of a chattel mortgage." Afterwards she was notified by one W. L. Barth that he had been directed by "the Browns to turn over certain effects" covered by a chattel mortgage she had. She went to Mr. Barth's house and found there some articles of ordinary household furniture. She left them there, taking away only a picture, which was not levied upon by the attachment writ. She further testified that "I do not know of my own knowledge that the articles found at Mr. Barth's house in Maywood which I have described are the same articles described in the mortgage as contained in 'Apt. D-1' of 404 So. Ashland Blvd. I never saw them before I went to Mr. Barth's house."

EMERY S. WALKER, for appellant.

ODE L. RANKIN, for appellee.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. CHATTEL MORTGAGES, § 209*—*when evidence insufficient to identify property.* Where a chattel mortgage covering ordinary household furniture described the furniture as in a certain apartment upon a certain street and the mortgagee testified that she did not know of her own knowledge that the articles in question

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Harpman v. Andalman, 190 Ill. App. 29.

were the articles described in her chattel mortgage as contained in the apartment so described, the evidence is *held* insufficient to establish her right of property in the furniture in question which had been seized under an attachment writ.

2. CHATTEL MORTGAGES, § 210*—*burden of proof*. Where a right of property in certain household furniture, held under an attachment writ, is set up by the holder of a chattel mortgage, it is incumbent upon such mortgagee to prove that the furniture in question is the same furniture as that covered by the chattel mortgage.

3. CHATTEL MORTGAGES, § 209*—*effect of failure of mortgagee to show interest in property*. Where a mortgagee sets up a right of property in chattels taken under an attachment writ, it is of no concern of the mortgagee as to who is awarded title in the property, so long as the claim under the chattel mortgage is denied for insufficient identification of the property in question.

Simon Harpman, Appellee, v. Julius Andalman, Appellant.

Gen. No. 20,286. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. MORTON W. THOMPSON, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed November 30, 1914.

Statement of the Case.

Suit in attachment by Simon Harpman against Julius Andalman alleging that defendant was about to fraudulently conceal, assign or otherwise dispose of his property or effects so as to hinder or delay creditors. Both by general and special verdicts the jury found for plaintiff and judgment was entered on the verdicts. To reverse the judgment, defendant appeals.

JOSEPH H. LANDES, for appellant; JACOB COHEN, of counsel.

ADLER & LEDERER, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Baltimore Trust Co. v. Consolidated Adjustment Co., 190 Ill. App. 30.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. ATTACHMENT, § 246*—*when finding on attachment issue warranted by the evidence.* In attachment against defendant on the ground that he was about to fraudulently conceal, assign or otherwise dispose of his property, findings of the jury in favor of plaintiff held sustained by the evidence, there being evidence tending to show that defendant operated a junk yard, that he owed plaintiff for money loaned, and that after demands were made for payment defendant told plaintiff he was going to dispose of his business so that plaintiff could recover nothing, and it also appearing that soon thereafter the materials of the junk yard were removed, and one witness testified that "the wagons were going back and forth all day long" hauling scrap metal from the yard until there was hardly anything left.

2. EXECUTION, § 107*—*when motion for stay properly denied.* Where a judgment was recovered against a defendant in attachment, the judgment providing only for a special execution and plaintiff being entitled to an execution against the garnishee, held that a motion by defendant for a perpetual stay of execution was properly denied, though defendant was recently discharged in bankruptcy and an execution might be levied on other property, where the defendant did not properly limit his motion to such property.

Baltimore Trust Company, Appellee, v. Consolidated Adjustment Company, Appellant.

Gen. No. 20,306. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed November 30, 1914.

Statement of the Case.

Action by Baltimore Trust Company against Consolidated Adjustment Company on a contract of guar-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Baltimore Trust Co. v. Consolidated Adjustment Co., 190 Ill. App. 30.

anty. To reverse a judgment in favor of plaintiff, defendant appeals.

The contract involved in this case was substantially the same as that passed on by the Appellate Court in *Pritz v. Consolidated Adjustment Co.*, 189 Ill. App. 287, and the material parts of the contract appear in the opinion filed in that case. On the question whether the defendant under the terms of the contract had the right to continue the service until it recovered the amount of the guaranty, the decision in the *Pritz* case, *supra*, was held conclusive.

The contract in this case contains an alternative provision which was not in the *Pritz* contract and is to the effect that the services should be continued "until said company shall reasonably determine that an equitable adjustment of the claims listed hereunder cannot be secured." Evidence was submitted to the jury on the question whether such contingency had happened and the jury returned a verdict in favor of plaintiff.

DEHAVAN B. COLE, for appellant.

MUSGRAVE, OPPENHEIM & LEE, for appellee.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

GUARANTY, § 13*—*when evidence sustains finding as to happening of contingency.* Where an adjustment company entered into a contract of guaranty with a client to collect within a certain time a certain sum from the claims listed with it or to refund the initial fee paid to it by the client, and the contract contained an alternative provision that the company might continue its service beyond the time mentioned until it could reasonably determine that an equitable adjustment of the claims listed could not be secured, *held* in an action for a breach of the guaranty that a finding of the jury that it had been reasonably determined that an adjustment of the claims could not be secured was sustained by the evidence.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Fred Miller Brew. Co. v. Moir Hotel Co. et al., 190 Ill. App. 32.

Fred Miller Brewing Company, Appellee, v. Moir Hotel Company and Harry James, Appellants.

Gen. No. 21,070. (Not to be reported in full.)

Interlocutory appeal from the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding. Heard in this court. Reversed. Opinion filed November 30, 1914.

Statement of the Case.

Bill by Fred Miller Brewing Company against Moir Hotel Company and Harry James to restrain defendants from violating a written contract between the complainant and the Hotel Company whereby the said Hotel Company agreed to use and advertise only the domestic draught beer manufactured by complainant on certain premises, described in the contract as "property at the southeast corner of Clark and Madison streets, in the City of Chicago, County of Cook and State of Illinois, now occupied by the Morrison Hotel and Addition," of which the Hotel Company "is the owner or lessee under long-term leases," and "the premises at No. 65-67 West Madison Street * * * now occupied by the Edelweiss Restaurant."

The bill prayed for an injunction restraining defendants from using or advertising other than complainant's beer at No. 17 South Clark street, which was occupied by the Hotel Company under a short-term lease, and was located on Clark street south of the premises occupied by the hotel. The court granted an injunction *pendente lite* restraining defendants from using, selling, consuming or giving away upon the premises No. 17 South Clark street any domestic draught beer other than complainant's and from displaying any advertising matter upon the premises which would advertise any other such beer manufactured by any person other than the complainant. To reverse the decree, defendants appeal.

Clarke v. Taylor, 190 Ill. App. 33.

JOHN G. CAMPBELL, for appellants.

WINSTON, PAYNE, STRAWN & SHAW, for appellee;
EDWARD W. EVERETT and R. S. TUTHILL, Jr., of counsel.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

CONTRACTS, § 215a*—*agreement to use a certain kind of beer on certain premises construed.* A written contract between a brewing company and a hotel company whereby the latter agreed to use and advertise only the domestic draught beer manufactured by the brewing company on premises now occupied by a hotel and addition, of which the hotel company "is the owner or lessee under long-term leases," and other premises occupied by a certain restaurant, *held* not to cover premises in possession of the hotel company under a short-term lease and not used or intended to be used for hotel purposes, and it also appearing that it could not be included in the premises occupied by said restaurant.

Margaret T. Clarke, Plaintiff in Error, v. Julius S. Taylor, Defendant in Error.

Gen. No. 20,144.

1. APPEAL AND ERROR, § 578*—*when findings of master are assumed to be correct.* Where no exception is taken to findings of facts, it will be assumed on appeal that the master states them correctly.

2. LIMITATIONS OF ACTIONS, § 117*—*when action on note is barred.* Evidence *held* to show that liability of a defendant on a note and mortgage to his sister, given in settlement of her claims to the estate of their father, was barred by the statute of limitations, it appearing that a payment to the plaintiff by the defendant's son was not the act of such defendant or by his authority.

3. TRUSTS, § 43*—*when resulting trust arises.* Where a brother gave his sister a note and mortgage in settlement of her claims

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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to the estate of their father, and such mortgage was not recorded or paid, and the defendant subsequently sold the property covered by the mortgage, but not until after the mortgage had ceased to be enforceable, no trust arise as to the money received by him in favor of the sister.

4. TRUSTS, § 66*—*when constructive trust arises.* Evidence held insufficient to show that a settlement entered into by a brother and sister, whereby the former gave a note and mortgage to the sister for her share in their father's estate, was so affected with fraud that a constructive or resulting trust arose in favor of the sister, although the valuations placed on the property were unfair to the sister.

5. TRUSTS, § 238*—*when action to enforce trust is not barred by lapse of time.* Where a brother gave a sister a note and mortgage for her share in their father's estate, and also for a sum entrusted to such father, and in an action for an accounting it appeared that the note as such was unenforceable against the defense of limitations, the evidence did not show intelligent knowledge or assent by the sister to the destruction of the constructive trust raised by the assumption of possession of the money by the son and heir of the original trustee, and such trust fund was not converted into an ordinary debt, wherefore the defense of limitations was not available as to the money loaned.

Error to the Superior Court of Cook county; the Hon. CLINTON F. IRWIN, Judge, presiding. Heard in this court at the March term, 1914. Reversed and remanded with directions. Opinion filed December 21, 1914. Rehearing denied January 4, 1915.

EDGAR L. MASTERS, for plaintiff in error.

LOUIS LAGGER, for defendant in error; WILLIAM T. PAYNE, of counsel.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

This writ of error is sued out to reverse a decree of the Superior Court of Cook county, dismissing for want of equity a bill brought by the complainant, Margaret Taylor Clarke, against Julius S. Taylor, her brother, for an accounting and to enforce the execution of an alleged trust.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Assuming on all disputed points but one, to be hereafter discussed, the correctness of the defendant's version of the occurrences and transactions resulting in the litigation herein involved, those occurrences and transactions, as shown by the pleadings and evidence, were:

When the father of the complainant and defendant, one Julius Taylor of Kankakee, died in 1891 he left only these two children his heirs. The complainant was a widow. Her husband had died a little more than two years before. He left a life insurance policy of \$5,000, on which his widow, the complainant, received \$4,800. Her father, Julius Taylor, learning that she was about to lend this money on mortgage of real estate in Chicago, suggested that she "let him have it," leaving with her no note or contract specifying time, terms or conditions of payment or interest, except that he said he would "give her the same interest that she would get there." Some piece of paper, which the father said pertained to complainant's sister-in-law's land, but which complainant never read, was handed by the father to his daughter and immediately returned by her to him, she had "so much confidence" she says. The father paid no interest nor returned any part of the principal, but, as the defendant says, in the original sworn answer filed by him in this cause, "there was still at his father's death in his hands * * * the sum of \$4,800." This declaration the defendant repeated in the same language in an amended answer filed six months later and shortly before he gave a deposition in this cause.

The father left of personal estate, however, only \$430, which was not enough to pay funeral expenses and doctor's bills and "debts that he had around town." He did, however, leave a house and lots adjoining in Kankakee and a farm of three hundred and twenty acres.

In default of a will which was supposed to exist, but which could not be found, the brother and his widowed

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sister undertook to settle affairs between them without the interference of the Probate Court. It is evident from the character of her testimony and by her course of proceeding that the complainant was unversed in business. Whether or not her brother, the defendant, was so versed, does not appear, otherwise than that he had been a traveling salesman and also in business for himself in Indiana. This was the settlement he made with his widowed sister: He took the farm at an agreed valuation of \$16,000, and gave his sister the Kankakee house and lots at an agreed valuation of \$6,000. Quitclaim deeds were exchanged to vest these titles. As at these valuations, each would have been entitled to \$11,000 worth of property, the defendant admitted himself as owing \$5,000 "owelty" to the complainant. At the same time, if the \$4,800 was in his father's hands, he must have taken possession of that. He did not, however, turn it over to his sister, to whom it belonged. He says, in his deposition: "I assumed that \$4,800." He gave her a note for \$9,800 to represent the \$5,000 and the \$4,800. It ran thus:

"Kankakee, Ills., May 11th, 1891.

On or before five years after date I promise to pay to the order of Margaret T. Clarke \$9800 Nine Thousand Eight Hundred Dollars with interest at the rate of six (6) per cent. per annum. Value received. Interest payable semi-annually.

JULIUS S. TAYLOR."

To secure this note of \$9,800 the defendant gave his sister a mortgage on one-half the farm, that is, on one hundred and sixty acres. The valuation on which the settlement was made, assuming an equal or average value per acre of the farm, would have made this quarter section worth \$8,000—not a very satisfactory security for \$9,800.

The deed to the house and lots in Kankakee running to Margaret T. Clarke was recorded in Kankakee county on May 11, 1891.

On Mrs. Clarke's examination before the master in this cause, the deed was shown her by counsel and she was asked:

"Q. Is this the deed to the town house in Kankakee that you got? A. Yes, sir. That is the only deed I ever had.

Q. And you recorded that? A. Yes, sir."

Mr. Hunter, the lawyer who was called in and drew these papers—note, quitclaim deeds and mortgage—testified that they were all executed at the same time at the Taylor house in Kankakee and that he does not remember taking possession of any of them to carry to record or otherwise afterwards. As the quitclaim deeds are dated May 9th, and the one to Margaret Clarke (which alone appears in the transcript, although both were introduced in evidence) was acknowledged before Hunter on May 9, 1891, while the note and mortgage are dated May 11, 1891, and the latter acknowledged on that date before Mr. Hunter, it would appear that Mr. Hunter was mistaken in his testimony. He was asked if he did not remember that Julius S. Taylor, the defendant, handed him the two quitclaim deeds and that he took them back to the recorder's office, which was next to his own in the court house, and had them recorded, and replied that he did not so recollect, but that he would not say that was not the fact. The significance of this testimony about recording lies in the fact that while both quitclaim deeds were recorded—the recorder's certificates showing that they were recorded at practically the same time—the mortgage was never recorded; and for this neglect the complainant has suffered. The defendant's counsel strenuously insists on the "laches" of the complainant, who must have known, he says, of the necessity of recording the mortgage because she recorded the quitclaim deed.

It does not appear in the evidence, but it is stated in the sworn bill of the complainant, and seems to be

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assumed as true, that the complainant sold the house and lots in Kankakee years afterwards for \$4,000. She alleges she used her best efforts to obtain a better price. The defendant had better success. He is careful to say in his answers and in his testimony that he did not advise his sister about recording her mortgage. We must assume, in the lack of evidence to the contrary, that he neither advised her to record nor to abstain from recording the mortgage. His testimony, however, that he does not know what Mrs. Clarke did with her mortgage cannot be considered as meaning that he did not know that she had left it unrecorded. A man does not "traffic," as he admits in his sworn answer he did, in land encumbered for more than it is worth at his own valuation, without knowing that the prior encumbrance is not in the way of his negotiations. He had not forgotten his sister's mortgage nor was he ignorant of its existence when, because of its absence from the record, he was enabled, as the master finds, to sell to "a bona fide purchaser" "the whole of said lands, including the land on which the complainant held her unrecorded mortgage for \$26,860."

Counsel for defendant deprecates any complaint being made of the "trafficking" admitted by the defendant. He says:

"There is no merit in such complaint, because if there was no fiduciary or trust relation created in or by the settlement in question, the parties must be held to have dealt at arms length. In such event each of the parties had the undoubted right to subsequently deal in the title of their own respective holdings. No authority has been or can be cited that a person giving a mortgage is estopped from further encumbering his land, or from selling the same. Neither does the law require the mortgagor to see to the recording of the mortgage he gives."

If this is to be understood as meaning that because the law gives to an innocent subsequent purchaser or encumbrancer, ignorant of a prior mortgage, a priority

of right over such mortgage, the mortgagor is not guilty of fraud towards the prior mortgagee when, in effect, he deliberately steals his or her security,—we must dissent. It is a penal offense to deal in that way with personal property mortgaged. We see no greater crime morally in that than the defendant in this case committed towards his sister.

The findings of the master in relation to payment on the note of \$9,800 which the defendant had given to the complainant, and the dealings of the defendant with the land which he had mortgaged to her to secure it, are these, when chronologically arranged:

November 11, 1891, he paid the complainant \$319.

July 6, 1894, he placed a mortgage on the whole three hundred and twenty acres (including the one hundred and sixty on which the complainant held a mortgage), the amount not stated. October 20, 1894, this mortgage was released.

February 4, 1895, he paid his sister \$50 more; November 4, 1895, another \$50.

August 19, 1897, he placed a mortgage on one hundred and sixty acres of his land (which one hundred and sixty acres is not mentioned), which mortgage was not released until March 5, 1906.

Meanwhile, in June, 1898, and November, 1898, he made his last payments to his sister—\$25 on the first date and \$50 on the second.

September 10, 1902, he placed a mortgage on the whole three hundred and twenty acres for \$14,000, which on October 14, 1907, was released. But on October 5, 1907, he mortgaged “one-half of said lands for the sum of \$7,000 and afterwards, on November 12, 1910, he and his wife made an absolute conveyance of the whole of said lands, including the land on which the complainant held her unrecorded mortgage, to a bona fide purchaser for the consideration of \$26,860, and since the making of said last mentioned convey-

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ance said Julius S. Taylor has had no right, title or interest in said lands.”

As no exception has been taken to the findings of the facts and the dates of these specified mortgages and conveyance, we assume the master states them correctly, although we are somewhat at a loss on inspecting the record to see how the master ascertained precisely the date and extent of the final conveyance. With what we conceive may be a somewhat characteristic wavering of statement, the defendant has given several dates for it. In his deposition he says nothing about it, but in his sworn answer filed October 13, 1911, he says that:

“On October 5, 1907, he mortgaged *one-half* of the said Three Hundred and Twenty acres for the sum of \$7,000 and afterwards, on November 12, 1910, together with his said wife, duly conveyed *the same* for a consideration of \$26,860.”

This would apparently mean that he had sold only one-half his land on November 12, 1910. In his amended answer filed May 1, 1912, he makes the same statement in the same words, but immediately follows it with this allegation:

“And that *since* the said eleventh day of May, A. D. 1891, (the date of the mortgage to his sister) and the *commencement of this suit* he has sold and conveyed to other persons the whole of said Three Hundred and Twenty acres and is not now the owner or possessor of any part thereof.”

This may be a clerical error, and insertion of the word “before” may have been meant between “and” and “the commencement,” but we are puzzled to account for the assertion further on in the amended answer, “that from the said ninth day of May, A. D. 1891, *until the month of December, A. D. 1906*, this defendant continuously resided upon and wholly occupied and held the sole possession of the whole of the farm lands * * * and that the said grantees of this de-

fendant to whom he conveyed the whole of said farm lands as aforesaid had a like adverse possession and a like actual residence upon the whole of said farm lands *from and including the said month of December, A. D. 1906*; that when this defendant surrendered the possession of the said farm lands to his said grantees *because of his said conveyance to them in the said amount last above mentioned*, the said grantees of this defendant took immediate possession and forthwith took up their residence upon said farm lands and held the same as aforesaid.”

However this may be, there is no doubt the land is no longer in the defendant's hands or available for the complainant's security. But this is not all of her misfortune. The defendant insists and the master and court below have found that all personal liability of the defendant to her has also vanished.

The last payments of either principal or interest, as above stated, were made in 1898, and left due, if all the payments were applied on the principal and no account taken of interest, over \$9,300. In December, 1910, the complainant asked for money from the defendant, but the defendant's son opened the letter and without consulting his father or obtaining authority from him furnished his aunt from his own funds with \$50, which the complainant accepted as a loan, the master finds; and when a further demand by the complainant was made on the defendant he invoked the protection of the (to him) beneficent statute of limitations, which he sets up and insists on in his answer in this case.

This statement of the case, as we said in the beginning, assumes the accuracy of defendant's version of these matters, except as to the relation between the complainant and her father in the first instance, and between the complainant and the defendant afterwards, as to the \$4,800.

The defendant maintains that his father borrowed the \$4,800 from Mrs. Clarke and that he, the defend-

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ant, merely assumed the debt, and evidenced it, as his father had not, by a promissory note, and that no trust relation existed between any of the parties as to this money. It is maintained for him by counsel that when the father died this \$4,800 was not in his hands, but had been spent or paid out, and that the defendant in his testimony means, when he says that his father left only \$430 of personal estate, that no such sum of \$4,800 was found. We think he has estopped himself by his answer, which we have quoted, from putting such a construction on his meager testimony in this regard. And there are other considerations which are of force in this matter. If the \$4,800 was a simple loan to the father, why was no note given? Why was no interest paid? Why was no time set for its repayment? It seems to us more reasonable to suppose that the father—an old resident of Kankakee and a prominent member of the Presbyterian Church there—thought that he could take better care for his daughter of her “widow’s mite” than she herself, unversed in business and the methods of mortgage brokers, would be likely to do.

As to the money being on hand when the father died and its having been taken possession of by defendant, there are also, to our minds, objections to the theory to the contrary advanced in behalf of the defendant. If the \$4,800 was not on hand, it was, whether trust funds or not, a claim against the estate. The defendant was under no obligation, if he did not find the money and did not take possession of it, to make himself personally responsible for it to his sister. His subsequent conduct does not strongly tend to establish any presumption that he would go beyond his legal obligations to help “a widow in her affliction” even when that widow was his sister. The valuation he put on the farm was \$16,000 and on the house \$6,000. It is the theory of the defense that they were reasonable valuations at the time. Then the value of the estate

was \$22,000 less \$4,800, which should have been paid from it to Mrs. Clarke at the earliest possible moment. The residue would have been of the value of \$17,200. One-half of it, or \$8,600, would have been Mrs. Clarke's and one-half, or \$8,600, the defendant's. If she took the Kankakee house at \$6,000 she would have been entitled to only \$2,600 more from her brother had he taken what remained of the estate. If, then, he had come to an agreement with his sister by which he was to substitute himself for the estate as the debtor, and to retain the farm intact instead of having it sold to pay the claim of \$4,800 against the estate, he would have been indebted to her only in the sum of \$4,800 plus \$2,600, or \$7,400, instead of in the sum of \$9,800. The settlement that he actually made, assuming that he intended to carry it out without fraud, would, in that case, as the counsel for complainant points out, mean that he gave his sister values of \$15,800 and took values of \$6,200—when the payment of her just dues and an equal division of the residue would result in her obtaining the value of \$13,400 and he the value of \$8,600. We find it difficult in the light of his subsequent conduct to believe that he thus treated his own interests.

In this litigation the complainant, as we understand, has maintained that the defendant should account to the complainant: *First*, for the \$4,800 which she asserts was entrusted to her father and at his death taken possession of by the defendant, who thereby became a trustee for her in regard to it; *second*, up to the amount of the remainder of the \$9,800 note for the proceeds of the farm so far as those proceeds were moneys obtained by the defendant for land which he had mortgaged to her to secure owelty, and then sold regardless of the mortgage; *third*, in addition to this, for half the proceeds of the farm in so far as those proceeds exceeded the value of the house and lots and the owelty which he allowed her in computing the amount of the note he gave her in 1891,—this last

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demand being predicated on the allegation either that no final valuation was agreed on, or that it was agreed that anything obtained by the defendant on a sale of the farm over and above the valuation placed on it by him in the adjustment should accrue to the benefit of the complainant equally with the defendant; *fourth*, for interest upon these amounts to the present time.

In the alternative the complainant says that if the settlement in 1891 between the complainant and defendant is to be considered as one which negatives or excludes the theory of a trust, the note of \$9,800 is still enforceable, the last payment having been made thereon, as she alleged, in December, 1910, and not earlier, and the running of the statute of limitations having been thereby tolled. The master found against all these contentions and the chancellor confirmed the report, overruled all the objections and dismissed the bill.

With some of the findings of the master and with the chancellor's disposition of some of the exceptions to his report, we are compelled to agree. There seems no doubt from the evidence that the delivery of \$50 to the complainant in December, 1910, was not the act of the defendant or by his authority. He has not manifested at any time since the period of limitation expired a disposition to do anything which should recognize either a legal or moral right in his widowed sister to the amount of the note he gave her, partly for her husband's life policy and partly for her share in her father's farm. He was under no obligation even to plead the statute in this litigation, but he has done so and we must hold that the liability of the defendant on the note of \$9,800 itself, as a note, disjoined from any question of a trust in its consideration, is unenforceable, and would have been so unenforceable in the face of the defendant's choice to plead the statute to it, at all times since November, 1908; and also, that since that date no foreclosure could have been made of the mortgage securing the note.

Therefore, although there is at least plausible ground for arguing, as the complainant does, that money received by a mortgagor for land, which he knows to be subject to his unpaid, unrecorded and enforceable mortgage, can be considered as received by him with a resulting trust in favor of the mortgagee attaching thereto, we cannot hold, in face of the finding that the defendant did not sell his land and receive the consideration for it until after the mortgage had ceased to be enforceable, that any trust was fastened upon the money so received by him.

Again, whatever reasons for suspicion may be found in the evidence that the valuations of \$16,000 and \$6,000, placed on the farm and house and lots respectively in 1891 by the brother and sister, were unfair to the complainant, the evidence as a whole falls short of proving that which would be necessary to so infect the arrangement with fraud that a constructive or resulting trust would be raised.

We are accordingly in agreement with the master and with the court below as to all but the \$4,800 which the complainant derived from her husband's life insurance policy, entrusted, as we think, for safe-keeping and care to one who stood in a position naturally inviting her trust and confidence, and after his death, as we also think, taken possession of by her remaining nearest relative and natural protector.

As to this \$4,800, the only question after these conclusions remaining for us to decide is, whether its inclusion on the note of \$9,800 secured by a mortgage which is now, as well as the note, treated by the defendant as though it were never in existence, destroyed the trust character of the funds thus acquired by him, so that, because the note as such is unenforceable as a note against the defense of limitation, the complainant has lost all remedy in relation to them.

Clarke v. Taylor, 190 Ill. App. 33.

Mature consideration has convinced us that it has not. Each case of apparent or alleged conversion of a trust fund into an ordinary debt must be considered with regard to its own surrounding circumstances. In this case the relations and situation of all the parties involved and the precedent, contemporaneous and subsequent actions of them all, make us believe that there was no intelligent knowledge or assent by the complainant to the destruction of the constructive trust, which the assumption of possession of the money by a son and heir of the original trustee, raised. To quote from a distinguished text writer (Perry on Trusts, 6th Ed., vol. 1, sec. 245):

“During the possession and management by such constructive trustees they are subject to the same rules and remedies as other trustees, and they cannot avoid their liability by showing that they were not in fact trustees, nor can they set up the Statute of Limitations.”

We think the court below erred in not sustaining the first, second, third and sixth exceptions to the master's report, and in confirming and approving the master's report in all respects and overruling all the complainant's exceptions thereto and dismissing the complainant's bill for want of equity, and the decree is therefore reversed and the cause remanded to the Superior Court with directions to sustain the exceptions to the master's report above indicated, and to enter a decree requiring the defendant, as trustee, to account to the complainant for \$4,800 with interest at five per cent. from May 11, 1891, which is found by us to be a date subsequent to his taking possession of the same, taking credit, however, for the payments proven to have been made and proper interest allowance thereon, and to pay over the sum and interest thus found remaining due to her.

Reversed and remanded with directions.

J. A. Lucas, Defendant in Error, v. Malcolm Lamont et al., trading as Lamont & Clasen, Plaintiffs in Error.

Gen. No. 20,182. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HARRY M. FISHER, Judge, presiding. Heard in this court at the March term, 1914. Reversed and remanded. Opinion filed December 21, 1914.

Statement of the Case.

Action by J. A. Lucas against Malcolm Lamont and E. Norman Clasen, trading as Lamont & Clasen, to recover a brokerage fee for the sale of real estate. Plaintiff recovered a judgment for \$131.25, and the defendants bring error.

JENNINGS & FIFER and ANDREW HUMMELAND, for plaintiffs in error.

WILLIAM J. AMMEN, for defendant in error.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

Abstract of the Decision.

PARTNERSHIP, § 249*—*when judgment in favor of individual is erroneous.* A judgment for brokerage fees for the sale of real estate in favor of an individual is erroneous where the evidence shows that the claim for such fees was that of a partnership.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Crowther v. Bell et al, 190 Ill. App. 48.

Jean E. F. Crowther, Defendant in Error, v. Ellen R. Bell and Ruth J. Maurer, Plaintiffs in Error.

Gen. No. 20,222. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH P. RAFFERTY, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed December 21, 1914.

Statement of the Case.

Action by Jean E. F. Crowther against Ellen R. Bell and Ruth J. Maurer on the following written instrument:

“August 4th, 1908.

For 80 shares of stock in the Marinello System I promise to pay to Jean E. F. Crowther \$1,000, \$500 now and commencing in November, 1908, \$25 a month until paid.

ELLEN R. BELL,
RUTH J. MAURER.”

Plaintiff recovered a judgment for \$515, and the defendants brought error.

WILLIAM N. MARSHALL and MARTIN H. FOSS, for plaintiffs in error.

CASTLE, WILLIAMS, LONG & CASTLE, for defendant in error; HOWARD P. CASTLE, of counsel.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

Abstract of the Decision.

1. **BILLS AND NOTES, § 13***—*when question of negotiability of instrument is immaterial.* The question whether an instrument meets the requirements of the Negotiable Instruments Act as to

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Berkshire Warehouse Co. v. Hilger & Co., 190 Ill. App. 49.

certainty of time of payment is immaterial where suit on such instrument is brought by the original payee, the money being unpaid and overdue at the time of suit.

2. **BILLS AND NOTES, § 50***—*when defense of want of consideration is not available.* The defense of want of consideration for a note is not available where it appears that the payee sold stock in a certain business to the maker, even though the stock was not as valuable as the purchaser thought, or was worthless, there being no evidence of fraud.

3. **CORPORATIONS, § 132***—*what is nature of certificate of stock.* Certificates of stock are but evidence of its ownership.

4. **BILLS AND NOTES, § 57***—*when defense of partial failure of consideration not available.* In a suit on a promissory note given for stock in a corporation, it could not be contended that the consideration had partially failed because the certificates of stock were not delivered before suit was brought, since the stock would become the property of the defendant on payment.

5. **BILLS AND NOTES, § 48***—*what defenses are available to accommodation maker.* An accommodation maker who is liable on a note given for the purchase of stock cannot avoid liability by contending that she received no consideration for signing the note.

Berkshire Warehouse Company, Appellee, v. Hilger & Company et al., on appeal of Edward Hines Lumber Company, Appellant.

Gen. No. 20,234. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. CHARLES M. FOELL, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed December 21, 1914.

Statement of the Case.

Suit by the Berkshire Warehouse Company, a corporation, against Hilger & Company, a corporation, and various other defendants for the determination and settlement of various mechanics' liens. The Edward Hines Lumber Company filed an intervening

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Berkshire Warehouse Co. v. Hilger & Co., 190 Ill. App. 49.

petition or answer asserting its right to a lien to the amount of \$857.59, on the premises, for lumber furnished the general contractors, Hilger & Company, and used in constructing certain improvements for the complainant. From a decree dismissing the intervening petition of said Edward Hines Lumber Company, for want of equity, it appealed.

ADAMS, CREWS, BOBB & WESCOTT, for appellant.

MAYER, MEYER, AUSTRIAN & PLATT, for appellee.

MR. PRESIDING JUSTICE BROWN delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1325*—*when findings of lower court are presumed true.* Findings of a master and court which are not attacked below or in the assignments of error will be assumed to be true on appeal.

2. MECHANICS' LIENS, § 94*—*when notice of material man must be given.* Under section 24 of the Mechanics' Lien Act, (J. & A. ¶ 7162) a notice of the furnishing of materials "may" be given at any time after the subcontractor or party furnishing labor or materials has made his contract, but such notice "shall" be given within sixty days after the completion thereof.

3. MECHANICS' LIENS, § 90*—*what is effect of contractor's statement to owner as to liens.* Under section 27 of the Mechanics' Lien Act, (J. & A. ¶ 7165) a subcontractor whose name is omitted from a statement by the original contractor, such as is required by section 5, even though the statement is false and defective because of such omission, cannot enforce a claim or lien against an innocent owner who has not in his hands sufficient money due or to become due the original contractor to satisfy both such claims, and all the claims which have not been so omitted from the contractor's statement, unless he can show that before the payments to the contractor or subcontractors named in the scheduled statement, which have caused the deficiency, he has served such a notice as is provided for by section 24 of the Act (J. & A. ¶ 7162).

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

E. M. Willoughby et al., trading as Willoughby & Company, Defendants in Error, v. Philip S. Brown, Plaintiff in Error.

Gen. No. 19,428.

1. **PRINCIPAL AND AGENT, § 113***—*when agent may employ broker.* Authority to sell or lease does not imply authority in the agent to employ a broker.

2. **PRINCIPAL AND AGENT, § 168***—*when agent is individually liable.* An agent who employs a broker to procure a lessor for premises is individually liable for the services of such broker, when his act is not authorized, even though such agent has no interest in the property involved.

3. **APPEAL AND ERROR, § 1238***—*when appellant cannot complain of error below.* In a suit by brokers for commissions in procuring a tenant against an agent and an owner of property, it could not be contended that there could be no recovery against the agent alone, when the plaintiff, before verdict, dismissed the suit as to the owner.

4. **MUNICIPAL CORPORATIONS, § 103***—*when ordinance must be proved.* The court cannot take judicial notice of an ordinance.

Error to the Municipal Court of Chicago; the Hon. JOHN K. PRINDIVILLE, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed December 21, 1914. Rehearing denied January 4, 1915.

EDWY LOGAN REEVES, for plaintiff in error.

ADLER & LEDERER, for defendants in error.

MR. JUSTICE BAKER delivered the opinion of the court.

This writ of error brings in review a judgment entered on a verdict for plaintiffs against plaintiff in error Brown in the Municipal Court on an agreement to pay plaintiffs \$846 as commissions for finding a tenant ready and willing to accept a lease for ninety-nine years of certain real estate on the terms offered by Brown.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Willoughby v. Brown, 190 Ill. App. 51.

Mary E. Ryan was the owner of the real estate and had given Brown a power of attorney to sell and convey the same. The power of attorney did not give authority to lease, nor did it give authority to employ a broker. Brown stated to plaintiffs that he was authorized to lease said real estate. Authority to sell or lease does not imply authority in the agent to employ a broker. *Doggett v. Greene*, 254 Ill. 134.

The promise by Brown to pay defendant for this service in finding a man ready, able and willing to accept a lease was binding on him individually. *Sadler v. Young*, 78 N. J. Law 594.

It was not necessary that Brown have any interest in the property placed by him in the hands of plaintiffs, to bind him personally by a promise to pay commissions. *Payne v. Twitchell*, 81 N. J. Law 193.

It is a sufficient answer to the contention that as the suit was originally against Brown and Mrs. Ryan, there could be no recovery against Brown alone, that the plaintiff, before verdict, dismissed as to Mrs. Ryan. *Malleable Iron Range Co. v. Pusey*, 244 Ill. 184.

There is in the record no ordinance requiring real estate brokers to be licensed. This court cannot take judicial notice of an ordinance, and the contention of plaintiff in error that the judgment must be reversed because no license was proved is without merit.

We think that on the facts shown by this record the jury properly found a verdict for the plaintiffs, and the judgment is affirmed.

Affirmed.

Patrick J. McDermott, Administrator, Plaintiff in Error, v. John Griffiths et al., trading as John Griffiths & Son, Defendants in Error.

Gen. No. 19,769. (Not to be reported in full.)

Error to the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1914. Reversed and remanded. Opinion filed December 21, 1914. Rehearing denied January 4, 1915.

Statement of the Case.

Action by Patrick J. McDermott, administrator of the estate of Patrick Finnerty, deceased, against John Griffiths and George W. Griffiths, partners, trading as John Griffiths & Son, for wrongfully causing the death of Finnerty. From a judgment of *nil capiat* entered on a verdict of not guilty, plaintiff brought error.

B. J. WELLMAN and RICHARD J. FINN, for plaintiff in error.

WINSTON, PAYNE, STRAWN & SHAW, for defendants in error; JOHN BARTON PAYNE and JOHN D. BLACK, of counsel.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. MASTER AND SERVANT, § 170*—*when master is bound by notice to agent.* Knowledge of a superintendent of the presence of gas in wells used for the construction of a building is knowledge of the master.

2. MASTER AND SERVANT, § 609a*—*what may be considered in determining master's negligence.* In an action for the death of an employee caused by the presence of gas in a well used in constructing a building, the jury might consider all the circumstances

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

McDermott v. Griffiths, 190 Ill. App. 53.

attending the accident, and the acts and conduct of the defendants prior to such death, but the verdict could only properly turn on the question whether the defendants were guilty of negligence which caused or contributed to the death of the employee.

3. NEGLIGENCE, § 191*—*what are questions of fact.* What is reasonable care in a particular case depends on the circumstances of the case and is peculiarly a question of fact for the jury.

4. MASTER AND SERVANT, § 800*—*when instruction as to place of work is erroneous.* In an action for the death of an employee caused by the presence of gas in a well used in constructing a building, an instruction that the jury might find that the defendants were not guilty of negligence if they found that such defendants exercised reasonable care down to a reasonable time before the death of the employee, was erroneous.

5. MASTER AND SERVANT, § 800*—*when instruction as to duty owing to servant is erroneous.* In an action for the death of an employee caused by gas in a well used in constructing a building, an instruction that if the employee was ordered to work in another well, and was killed when he returned to the first well to obtain a tool that he had left therein, he was a mere volunteer or licensee, to whom defendants owed no duty except to restrain from wilfully or wantonly injuring him, was, in effect, an instruction to find the defendants not guilty, and was erroneous as deciding the issues of fact as to whether the deceased went into the well to obtain a tool, and whether such act was within his employment, as matters of law.

6. MASTER AND SERVANT, § 709*—*what are questions of fact.* Where an employee was killed by gas in a well when he returned to obtain a tool he had left therein, the questions whether he went down into the well to obtain such tool, and whether in so doing he was reasonably within the scope of his employment, should have been submitted to the jury.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

John M. Gibbons, Defendant in Error, v. John F. Jurgensen and Fredericka Jurgensen, Plaintiffs in Error.

Gen. No. 19,906. (Not to be reported in full.)

Error to the Municipal Court of Chicago the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed December 21, 1914.

Statement of the Case.

Action by John M. Gibbons against John F. Jurgensen and Fredericka Jurgensen to recover commissions for finding a purchaser for certain real estate of which the defendant Fredericka Jurgensen, the wife of the other defendant, was the owner. From a judgment for the plaintiff for \$337.50, defendants brought error.

JAMES R. GLASS and WARREN B. WILSON, for plaintiffs in error.

EMERY M. SHAW, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

BROKERS, § 90*—*when broker is entitled to commissions.* Evidence held to show that a real estate broker procured a purchaser for certain property and that the property was conveyed to another person, for money furnished by the purchaser, with the purpose of defeating the broker's claim for commissions.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Casey v. Chicago Railways Co., 190 Ill. App. 56.

John D. Casey, Administrator, Appellee, v. Chicago Railways Company, Appellant.

Gen. No. 19,987. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. JOHN P. McGOORTY, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed December 21, 1914.

Statement of the Case.

Action by John D. Casey as administrator of Solomon Morris against the Chicago Railways Company for wrongfully causing the death of plaintiff's intestate, a boy eight years and eleven months of age. From a judgment for the plaintiff, defendant appeals.

CHARLES L. MAHONY and FRANK L. KRIETE, for appellant; W. W. GURLEY and JOHN R. GUILLIAMS, of counsel.

CRUICE & LANGILLE, for appellee; DANIEL L. CRUICE, of counsel.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

STREET RAILROADS, § 132*—*what are questions for jury in action for injuries.* In an action for the death of an eight-year-old boy, the question whether, if the motorman of defendant's street car had been operating his car with reasonable care and caution, he would have seen the decedent, on or so near the track as to be in danger of being struck by the car, in time to stop the car and avoid injuring him, and the questions whether the decedent was in the exercise of ordinary care, and whether the decedent's parents exercised care for his safety, were questions of fact upon which the verdict of the jury was conclusive.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Angelo B. Pirola, Plaintiff in Error, v. Edward Fladmark, Defendant in Error.

Gen. No. 20,184. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HARRY M. FISHER, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed December 21, 1914.

Statement of the Case.

Suit by Angelo B. Pirola against Edward Fladmark. Plaintiff plastered a certain building for defendant at the agreed price of \$1,828 and after the work was completed claimed \$116 for extras. A check in final payment was mailed to the plaintiff and accepted when there was due plaintiff \$200, exclusive of the claim for extras, but the plaintiff claimed to have mailed another letter to the defendant accepting the check as a credit. From a judgment for the defendant, plaintiff brings error.

H. P. TUCHSCHERER, for plaintiff in error.

CHARLES WERNO, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1414*—*when finding of court is conclusive.* In an action for services the question whether there was a bona fide dispute between the parties as to the amount due was a question of fact, as to which the finding of the court was conclusive, the evidence being conflicting.

2. ACCORD AND SATISFACTION, § 4*—*what constitutes accord and satisfaction.* In an action for services, if there was a bona fide dispute between the parties as to the amount due, and the plaintiff retained and cashed a check sent by the defendant having written on it words to the effect that it was the final payment for the work, such act amounted to an award and satisfaction.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Szremba v. Chicago Railways Co., 190 Ill. App. 58.

John Szremba by Helen Szremba, Appellee, v. Chicago Railways Company, Appellant.

Gen. No. 20,359. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in this court at the March term, 1914. Reversed with finding of fact. Opinion filed December 21, 1914.

Statement of the Case.

Suit by John Szremba, a minor, by Helen Szremba, his next friend, against the Chicago Railways Company to recover for injuries received in a collision between a street car and an electric truck. From a judgment for the plaintiff, defendant appeals.

JOSEPH D. RYAN, WILLIAM H. SYMMES and FRANK L. KRIETE, for appellant; W. W. GURLEY and J. R. GUILLIAMS, of counsel.

HIRAM BLAISDELL and A. H. RANES, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

STREET RAILROADS, § 86*—*when injury in collision is result of accident.* Where a boy on the rear end of an electric truck with his feet hanging over the end of the bed was injured by being caught between such truck and a street car, due to the truck suddenly stopping when another vehicle was driven in front of it, the accident was such that the motorman could not be required to anticipate it, and the injury was not due to the negligence of such motorman.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Reeder v. The West Side T. & S. Bank, 190 Ill. App. 59.

Joseph Reeder, Defendant in Error, v. The West Side Trust & Savings Bank, Plaintiff in Error.

Gen. No. 18,553. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HARRY P. DOLAN, Judge, presiding. Heard in this court at the March term, 1914. Reversed and remanded. Opinion filed December 21, 1914.

Statement of the Case.

Suit by Joseph Reeder against The West Side Trust & Savings Bank to recover money claimed to have been deposited with the defendant Bank for which he had not received credit. From a judgment for the plaintiff, the defendant brings error.

McEWEN, WEISSENBAUGH, SHRIMSKI & MELOAN, for plaintiff in error; JEROME J. CERMAK, of counsel.

No appearance for defendant in error.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

APPEAL AND ERROR. § 1414*—*when finding of court is not conclusive.* Where a person claimed to have made a deposit of \$158.50 in a bank but received a credit for only \$128.50, and produced a deposit slip from which it appeared that a mistake occurred in adding the amount of \$57 to \$71.50 so as to make a total of \$158.50, and the evidence was conflicting as to whether the "5" in the item of \$57 was written by the plaintiff or by the teller, *held* that the finding of the trial court that such figure was written by the teller was manifestly against the weight of the evidence, there being good ground for believing the contrary, wherefore a new trial would be ordered.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The Globe Ass'n v. Brega, 190 Ill. App. 60.

The Globe Association, Plaintiff in Error, v. Fannie F. Brega, Defendant in Error.

Gen. No. 19,468. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in this court at the October term, 1913. Reversed and remanded. Opinion filed December 21, 1914. Rehearing denied January 4, 1915.

Statement of the Case.

Suit by The Globe Association, a corporation, against Fannie F. Brega to recover sums expended in heating certain premises, due to the defendant's failure and refusal to furnish heat, when the plaintiff's lease required that the defendant lessor should furnish "steam heat when necessary, from October 1 to April 30, for ten hours *per diem*." From a judgment for the defendant, plaintiff brings error.

CHARLES DANIELS, for plaintiff in error.

GEORGE W. WILBUR, for defendant in error.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 192*—*what remedy is available where lessor fails to heat premises.* If a lessor fails to furnish heat as stipulated in a lease, the tenant may recoup the cost from the rent or sue upon the covenant.

2. LANDLORD AND TENANT, § 192*—*what may be shown in action for failure to furnish heat.* In an action to recover sums expended by a lessee in heating leased premises, due to the lessor's failure to furnish heat, the plaintiff is entitled to prove the failure to furnish heat, and testimony as to temperature is admissible.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Vanderploeg & Kuiper and A. U. Thompson, Defendants in Error, v. Ivor Peterson (Defendant), G. A. Selven (Garnishee), Plaintiff in Error.

Gen. No. 19,721. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN J. ROONEY, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed December 21, 1914.

Statement of the Case.

Suit in attachment by Vanderploeg & Kuiper and A. U. Thompson against Ivor Peterson, the attachment writ being served on G. A. Selven as garnishee. Subsequently the court found that Selven was indebted to Peterson in the sum of \$32.08 and judgment against the garnishee was entered, whereupon he brings this writ of error.

ISAIAH CAMPBELL, for plaintiff in error; HERBERT E. HERROD, of counsel.

HARRY C. LEEMON, for defendants in error.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. GARNISHMENT, § 64*—*when payment by garnishee after attachment is justified.* Where a garnishee had made a contract with the debtor for the painting of a building, and attempted to justify a payment made to the debtor after the service of an attachment writ, because of the fact that such debtor had made an equitable assignment of the amount due him on the contract to the parties furnishing material for the work, evidence that the material man stated that he had to be paid, which the garnishee understood to mean that

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Borg v. Kawin & Co., 190 Ill. App. 62.

such material man was holding him liable for the money, was insufficient to show an equitable assignment.

2. GARNISHMENT, § 64*—*what will protect garnishee who pays debt after attachment.* Where a garnishee made a payment to a debtor after the service of an attachment writ, on a contract for painting a building, claiming that he was justified in so doing because the material man would hold him liable for materials furnished the debtor, but it appeared that the statutory period for filing notice for materials furnished had elapsed, notice by such material man would not protect the garnishee.

Berney B. Borg for use of Otto Miller, Appellant, v. Kawin & Company, Garnishee. Walter J. Miller, Petitioner, Appellee.

Gen. No. 19,800. (Not to be reported in full.)

Appeal from the Municipal Court of Chicago; the Hon. EDWARD T. WADE, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed December 21, 1914.

Statement of the Case.

Otto Miller brought a garnishment suit on a judgment had by him against Berney B. Borg, summons being served on Kawin & Company as garnishee. The garnishee was indebted to Borg in the sum of \$1,100, which was the amount of the verdict in a suit brought by Borg against Kawin & Company, in which Borg was represented by Walter Miller, an attorney. Walter Miller filed an intervening petition in this garnishment proceeding, claiming a lien on the amount recovered because of a contract whereby Borg was to pay him one-sixth of the amount realized for his services. A copy of such contract with a notice of

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

a claim for attorney's lien was served on Kawin & Company in compliance with the statute (Hurd's Rev. St., ch. 82, § 55, J. & A. ¶ 611). On the trial the court sustained the claim for lien and ordered the sum of \$183.33, the amount awarded to the attorney, to be paid into court until its further order, and judgment was entered for the plaintiff for the balance of the fund owing from the garnishee. From such judgment the plaintiff appealed.

CHARLES G. ROSE and RINGER, WILHARTZ & LOUER,
for appellant.

WALTER J. MILLER and WALTER L. WENGER, for peti-
tioner.

MR. JUSTICE MCSURELY delivered the opinion of the
court.

Abstract of the Decision.

1. ATTORNEY AND CLIENT, § 138*—*when attorney is entitled to lien.* An attorney who has complied with the statute (Hurd's Rev. St., ch. 82, § 55, J. & A. ¶ 611) is entitled to a lien for his services.

2. APPEAL AND ERROR, § 1214*—*when appellant cannot complain of action of lower court.* An appellant who is not affected by an order requiring a sum due an attorney to be paid into court until its further order cannot complain of such order.

3. ATTORNEY AND CLIENT, § 150*—*what order in reference to lien may be entered.* A court in the exercise of its equitable powers in adjudicating an attorney's lien may properly order the amount due such attorney to be paid into court until its further order.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Rosenberg v. Underwriters Salvage Co., 190 Ill. App. 64.

Isaac Rosenberg, Appellant, v. Underwriters Salvage Company, Appellee.

Gen. No. 19,872.

1. CORPORATIONS, § 447*—*when corporation is liable for slander.* The test as to whether a corporation is liable for slander is whether the one uttering the slander did so in endeavoring to promote the corporation's business within the scope of the actual or apparent authority conferred upon him for that purpose. . . .

2. LIBEL AND SLANDER, § 90*—*when declaration against corporation states no cause of action.* A declaration for slander alleging that a corporation by its agent said that the plaintiff "stole a knife," states no cause of action.

3. PLEADING, § 248*—*when motion to amend declaration will be denied.* A motion for leave to amend a declaration which states no cause of action, is properly denied where the statute of limitations has run when leave to amend is asked.

Appeal from the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed December 21, 1914.

LEE D. MATHIAS and CHARLES H. ROBINSON, for appellant.

BATES, HARDING, EDGERTON & BATES, for appellee.

MR. JUSTICE MCSURELY delivered the opinion of the court.

This is a suit for damages for alleged slander. To the declaration a demurrer was filed and sustained and judgment entered dismissing the cause at plaintiff's cost. The declaration alleges that "The Underwriters Salvage Company, a corporation, of Chicago, Illinois," "in a certain discourse which the defendant then and there had, by and through one of his agents," said: "'You' (meaning the plaintiff) 'stole a knife' (mean-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

ing a knife belonging to the defendant). 'Well come on give me the knife' (meaning the knife the defendant had accused the plaintiff of stealing from the defendant).''

We are of the opinion that the declaration stated no cause of action, and the court was right in sustaining the demurrer and dismissing the cause. We find in 31 Cyc., Vol. 31, p. 1581, a concise statement of the law, digested from a very large number of cases in the courts of almost every State and in the United States courts, as follows:

"Upon the principle that he who does an act by another does it himself, a principal is liable to third persons for the torts which he has expressly authorized or specially directed his agent to commit.

"The liability of the principal for torts committed by his agent is not limited to torts which he has expressly authorized or directed; he is liable for all the torts which his agent commits in the actual or apparent course of his employment; and if the agent commits a tort in the apparent course of his employment the principal is liable therefor even though he was ignorant thereof and the agent in committing it exceeded his actual authority or disobeyed the express instructions of his principal. Thus a principal is civilly liable to third persons where his agent, while acting within the scope of his real or apparent authority, is guilty of assault and battery, conversion, fraud, or trespass; and he is also liable for the negligence of his agent resulting in injury to person or property.

"A principal is not liable for the torts which his agent commits when not acting in the course of the employment, unless he subsequently ratifies them. Nor is a person liable for the torts of one who does not bear to him the relation of agent, unless he has so acted in permitting the alleged agent to represent him that he is estopped to deny the agency.

"While the term 'course of employment' is impossible of precise definition, it may be said broadly that the act of an agent is within the course of his employ-

Smyth-Wales v. John M. Smyth Co., 190 Ill. App. 66.

ment when the agent in performing it is endeavoring to promote his principal's business within the scope of the actual or apparent authority conferred upon him for that purpose."

The test inquiry concerning the liability of a corporation for slander is, did the one uttering the slander do so in endeavoring to promote the corporation's business, within the scope of the actual or apparent authority conferred upon him for that purpose? If we apply this test to the declaration in question, it is at once apparent that it omits almost every essential charge necessary to the statement of a cause of action against the defendant. This is so clear on the face of it as to make any detailed analysis of the declaration unnecessary.

This is not the case of a defective statement of a cause of action, but it is a statement of no cause of action. Hence, the statute of limitations having run when leave was asked to amend, it was not error to deny the motion.

The judgment was right and is affirmed.

Affirmed.

Sarah B. Smyth-Wales, Appellant, v. John M. Smyth Company, Appellee.

Gen. No. 20,097. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. DENIS E. SULLIVAN, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed December 21, 1914. Rehearing denied January 4, 1915.

Statement of the Case.

Suit by Sarah B. Smyth-Wales, a stockholder of the John M. Smyth Company, a corporation, to have such

corporation enjoined from purchasing from the John M. Smyth Merchandise Company, another corporation, capital stock of that company to the amount of \$400,000 in satisfaction of an indebtedness of a like amount due defendant from the Merchandise Company. A temporary injunction was issued without notice. Defendant subsequently filed an answer and affidavits were filed by both parties. On motion of defendant to dissolve the temporary injunction, the court ordered the bill dismissed for want of equity, and the complainant appeals.

GEORGE C. FRY, for appellant.

THOMAS A. LEACH, for appellee.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. INJUNCTION, § 9*—*what must be shown to warrant injunction.* A court of chancery will not grant an injunction to allay the fears and apprehensions of individuals, and will only grant protection against acts which are not only threatened but will in all probability be committed to the injury of the petitioner, and some fact or facts must appear from which the court can see that unless prevented the acts will in all probability be committed.

2. INJUNCTION, § 88*—*what facts will warrant injunction to prevent illegal act of corporation.* In an action by a stockholder to enjoin a corporation from illegally purchasing stock of another corporation, evidence that the attorney of the defendant Company had reported to the other corporation a suggestion of an officer of a bank with which the other corporation was doing business as to increasing the stock and using it to pay a debt to the defendant was insufficient to show that the purchase would be made, since it might be assumed that the defendant corporation would be guided by advice of its attorneys before making the purchase which advice was that such a suggestion was not legally possible of performance.

3. INJUNCTION, § 88*—*when evidence insufficient to warrant injunction against corporation.* In an action by a stockholder to enjoin a corporation from illegally purchasing stock of another cor-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Holy Nazarene Tabernacle Church v. Thornton, 190 Ill. App. 68.

poration, evidence of a conflict between stockholders, and that the stock of the other corporation was increased at a meeting which the complainant's proxy failed to attend, or was prevented from attending, was insufficient to justify an injunction though it might be grounds for apprehension by the complainant.

4. INJUNCTION, § 88*—*what will justify injunction to prevent illegal purchase of stock by corporation.* In an action to enjoin a corporation from illegally purchasing stock of another corporation, evidence that such other corporation increased its stock so that it could use a portion to pay a debt to the defendant corporation would not warrant an injunction, and since the other corporation was not a party to the suit the legality of its increase of stock could not be inquired into.

5. INJUNCTION, § 267*—*when injunction will be dissolved.* A groundless injunction should not be continued.

BAKER, J., dissenting.

Holy Nazarene Tabernacle Church v. Mattie L. Thornton et al.

On Appeal of Mattie L. Thornton, Appellant, v. The People of the State of Illinois, Appellee.

Gen. No. 20,366. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. DENIS E. SULLIVAN, Judge, presiding. Heard in this court at the March term, 1914. Reversed. Opinion filed December 21, 1914. Rehearing denied January 4, 1915.

Statement of the Case.

Suit for an injunction by the Holy Nazarene Tabernacle Church against Mattie L. Thornton and others. From an order of punishment based on a finding that Mattie L. Thornton was guilty of contempt of court in wilfully violating such injunction, she appeals.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Holy Nazarene Tabernacle Church v. Thornton, 190 Ill. App. 69.

E. H. WRIGHT and L. A. NEWBY, for appellant.

MACLAY HOYNE, for appellee; EDWARD E. WILSON, of counsel.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Abstract of the Decision.

1. INJUNCTION, § 259*—*when order of contempt for violating injunction is erroneous.* An entry of judgment in contempt for wilfully violating an injunction is erroneous where the bill of complaint which was the basis for the injunction has been dismissed.

2. INJUNCTION, § 209*—*what order constitutes dismissal of bill.* Where a corporation brought suit for an injunction and the defendant filed a plea of *nul tiel corporation*, and on reference to a master a report was filed, whereupon the defendant moved the chancellor to confirm the report and to dismiss the bill of complaint, an order stating that the court sustained the master's report and restored the rights of the defendant was, in substance and in view of what was intended, an order for dismissal of the bill.

Holy Nazarene Tabernacle Church v. Mattie L. Thornton et al.

On Appeal of W. G. Anderson, Appellant, v. The People of the State of Illinois, Appellee.

Gen. No. 20,367. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. DENIS E. SULLIVAN, Judge, presiding. Heard in this court at the March term, 1914. Reversed. Opinion filed December 21, 1914. Rehearing denied January 4, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Cherry v. Chicago Life Ins. Co. et al., 190 Ill. App. 70.

Statement of the Case.

This case involves the same situation as that considered in the case of *Holy Nazarene Tabernacle Church v. Thornton*, ante, p. 68, except that the appellant here is W. G. Anderson, the attorney for Mattie L. Thornton, appellant in the other case.

E. H. WRIGHT and L. A. NEWBY, for appellant.

MACLAY HOYNE, for appellee; EDWARD E. WILSON, of counsel.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Bertha R. Cherry, Appellee, v. Chicago Life Insurance Company and Federal Life Insurance Company, Appellants.

Gen. No. 20,509.

1. JUDGMENT, § 661*—*what is sufficient copy of judgment sued on.* In an action on a foreign judgment, an instrument attached to the declaration entitled: "Copy of instrument sued upon," which purported to be a copy of the judgment of the foreign State and of the judgment of the Appellate Courts in such State, was within the requirement of Rev. St. ch. 110, par. 32, J. & A. ¶ 8569, though not authenticated as required by the Act of Congress (U. S. Rev. St. Tit. 13, ch. 17, § 905), since such act is concerned with the admissibility of evidence of a judgment of another State.

2. JUDGMENT, § 661*—*what must be shown in action on foreign judgment.* In an action on a foreign judgment it is not necessary to attach to the declaration copies of the proceedings in the courts of the foreign State.

3. JUDGMENT, § 661*—*what allegations are necessary in suit on foreign judgment.* In an action on a foreign judgment it is not

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Cherry v. Chicago Life Ins. Co. et al., 190 Ill. App. 70.

necessary to allege in the declaration the jurisdiction of the courts of the foreign State.

4. JUDGMENT, § 578*—*when foreign judgment is res adjudicata as to particular matter.* In an action on a foreign judgment, where the issue of jurisdiction of the parties was raised and adjudicated after full hearing in the courts of the foreign State, the judgment of such foreign State is *res adjudicata* upon the jurisdictional questions raised and adjudicated there, and such questions cannot be raised again in a suit on the judgment.

Appeal from the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed December 21, 1914. Rehearing denied January 4, 1915.

DUNCOMBE & BEHAN, for appellant Chicago Life Insurance Company.

CHARLES A. ATKINSON and CHILTON P. WILSON, for appellant Federal Life Insurance Company.

ATWOOD, PEASE & LOUCKS, for appellee.

MR. JUSTICE MCSURELY delivered the opinion of the court.

Plaintiff brought suit in the Superior Court of Illinois on a judgment recovered in the State of Tennessee against these defendants, and had judgment here. Defendants have appealed.

The declaration alleged the recovery of a judgment by plaintiff against both defendants in the Circuit Court of Chester county, Tennessee; that thereafter defendants sued out a writ of error from the Court of Civil Appeals of Tennessee to revise and correct the said judgment, and that the Court of Civil Appeals affirmed the judgment of the lower court and entered judgment for plaintiff against defendants for a certain sum of money and costs; that thereafter defendants filed a petition for certiorari in the Supreme Court of

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Cherry v. Chicago Life Ins. Co. et al., 190 Ill. App. 70.

Tennessee to review the judgment of the Court of Civil Appeals; that the cause was heard by the Supreme Court and that it was adjudged that said "writ of certiorari" be dismissed. Attached to the declaration is an instrument entitled: "Copy of instrument sued upon," which purports to be a copy of the judgment of the Circuit Court of Chester county, Tennessee, and of the judgment of the Court of Civil Appeals and of the Supreme Court. One of the points urged by defendants is that this is not a copy of the instrument sued on, as required by the Illinois statute (paragraph 32, chapter 110, J. & A. ¶ 8569) to be attached to the declaration, because it is not authenticated according to the Act of Congress (title 13, chapter 17, sec. 905, R. S. U. S.). We hold that the copy attached to the declaration is within the requirement of our statute; the Act of Congress is concerned with the admissibility of evidence of a judgment of another State. Neither is it necessary, as is suggested, to attach to the declaration copies of all the proceedings in the Tennessee courts. This suit is not upon the proceedings or upon any certificates of exemplification, but upon the judgment.

It was not necessary for plaintiff in her declaration to allege jurisdiction of the courts of Tennessee. *Rae v. Hulbert*, 17 Ill. 572; Black on Judgments, section 875.

The substantial question presented has to do with the jurisdiction of defendants by the Tennessee courts. This issue was raised by appropriate pleadings in the case in the Circuit Court of Chester county, and there it was adjudged that the court had jurisdiction of the defendants. Defendants then sued out of the Civil Court of Appeals of Tennessee a writ of error seeking to revise and correct the judgment of the Circuit Court. Upon hearing, the Civil Court of Appeals considered a transcript of the record from the Circuit Court, which included the evidence, and rendered an opinion

discussing at length the question of jurisdiction and affirming the judgment of the lower court and entered a judgment for plaintiff against the defendants. Subsequently the Supreme Court by its order found that the Circuit Court did have jurisdiction of the defendants, and ordered the writ of certiorari dismissed and entered judgment for costs. There can be no doubt that the question of jurisdiction was adjudicated in the Tennessee courts, on a writ of error sued out by themselves.

The claim of defendants is that regardless of this adjudication they may raise the same question whenever and wherever in any other State than Tennessee suit is brought on this judgment. After an examination of the cases cited in support of this claim, we have found none directly in point. The decisions cited by defendants have to do with cases where the court entering judgment assumed jurisdiction but did not expressly consider or pass upon the question of its jurisdiction, or where there is a mere recital in the judgment rendered by the court of another State that it did have jurisdiction, and it was held in *Forsyth v. Barnes*, 228 Ill. 326, that this mere recital would not prevent the courts of another State from inquiring into the question of jurisdiction. Other of the decisions discuss the question whether a court of appellate jurisdiction is precluded from inquiring into the question of jurisdiction of the lower court by the fact that defendant may have filed a special appearance to contest the point of jurisdiction, and when defendant's contention was overruled filed an answer to the merits of the case. Such a case is *Harkness v. Hyde*, 98 U. S. 476. The case before us manifestly does not fall within any of these classes, for we have here a case where the issue of the jurisdiction of the parties was raised and adjudicated after full hearing,—all of which appears from the proceedings in this case and not merely as a matter of recital. As against the posi-

Cherry v. Chicago Life Ins. Co. et al., 190 Ill. App. 70.

tion of defendants we find a statement in 2 Black on Judgments, sec. 901, which meets with our approval:

“Before leaving this point it is necessary to remark that there is good authority for the proposition that if it appears affirmatively from the record of the judgment, and *as a matter of adjudication*, that the defendant had legal notice of the suit or duly authorized an appearance to be entered for him, then he is no longer at liberty to allege a want of jurisdiction. The reason of this is obvious. In such a case, the question of jurisdiction would be one of the grounds of defense to the original action, there set up and adjudicated, and of course equally concluded with any other defense. And hence the principle which forbids a re-examination of the merits of the controversy would apply.”

In accord with this is the decision in *Van Matre v. Sankey*, 148 Ill. 536, where the Court says, on page 553: “It having been determined, upon direct proceeding, by the court of last resort of the State in which the decree was rendered, that the court of common pleas had jurisdiction to enter the decree, we are required to give it full faith and credit.” And in *Chicago Title & Trust Co. v. National Storage Co.*, 260 Ill. 485, the Court, in discussing the adjudication of a jurisdictional question by another court, used the following language:

“An estoppel by verdict is but another branch of the doctrine of *res judicata*, and it rests upon the same principle of law,—that is, that a matter once litigated between parties to a final judgment in a court of competent jurisdiction cannot again be controverted. When this doctrine is applied to a single question or point arising in the course of litigation which has finally been adjudicated it is designated as an estoppel by verdict, and the same question or point cannot again be litigated between the same parties in the same or any other court at law or in chancery, and neither party, nor their privies, will be permitted to allege anything inconsistent with the finding upon that question. * * * The doctrine of estoppel by verdict

Corp. Service Co. v. Bolger, Mosser & Willaman, 190 Ill. App. 75.

applies to questions arising upon an issue as to the jurisdiction of the court as fully and completely as to questions arising upon the trial of a cause upon its merits, and is not affected by the circumstance that the court may ultimately determine that it can go no farther."

Other cases holding to the same effect are *Napier v. Gidiere* (S. C.), 40 Am. Dec. 613; *Waldo v. Waldo*, 52 Mich. 94; *In re Wrisley*, 126 Mich. 109; *McClure v. Paducah Iron Co.*, 90 Mo. App. 567; *Kinnier v. Kinnier*, 45 N. Y. 535. The reasons given in support of the decisions in these cases seem to us conclusive against defendants' contention, and we are of the opinion that the judgment of the Tennessee courts is *res judicata* upon the jurisdictional questions which were directly raised and adjudicated there, and that therefore it was not error for the court below to refuse to go into that question.

Other points made are without merit, and the judgment is affirmed.

Affirmed.

**Corporation Service Company, Plaintiff in Error, v.
Bolger, Mosser & Willaman, Defendant in Error.**

Gen. No. 19,538. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. THOMAS F. SCULLY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed December 22, 1914.

Statement of the Case.

Action by the Corporation Service Company, a corporation, against Bolger, Mosser and Willaman, a corporation, to recover \$126 claimed to have been earned under an agreement embodied in the following letter signed by defendant:

Corp. Service Co. v. Bolger, Mosser & Willaman, 190 Ill. App. 75.

“CHICAGO, ILL., July 29, 1912.

“THE CORPORATION SERVICE Co.,
8 So. Dearborn St.,
Chicago.

DEAR SIR:

Confirming understanding with your Mr. Graham today, beg to state that we accept your proposition to represent us before the State Board of Equalization in the matter of our capital stock taxes for the year 1912, for which service we are to pay you 50% of what we may save under \$252.

Yours very truly,
BOLGER, MOSSER & WILLAMAN,
By A. C. Heckler.”

Pursuant to said letter, plaintiff, by its attorney, appeared twice before said State Board with reference to its fixing the assessment on defendant's capital stock. In the meantime, the Supreme Court, in *People v. Federal Securities Co.*, 255 Ill. 561, decided that the State Board of Equalization had no power to assess the capital stock of a corporation for mercantile purposes, but that the assessment should be made by local assessors. At a subsequent appearance before said Board, plaintiff's attorney called its attention to said decision and to the fact that defendant was a corporation organized for mercantile purposes, and, because the Board did not assess defendant's stock, plaintiff claims that it thereby saved defendant \$252 and is entitled to fifty per cent. thereof. It appeared that in the previous year said Board assessed defendant's stock and the tax levied thereon was \$252. To reverse a judgment in favor of defendant, plaintiff brings error.

HENRY J. GIBBS, for plaintiff in error.

A. C. HECKLER, for defendant in error.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

The News Pub. Co. v. The Associated Press, 190 Ill. App. 77.

Abstract of the Decision.

CONTRACTS, § 309*—*when performance does not constitute compliance.* Where a corporation contracted for the services of a certain company in representing it before the State Board in the matter of its capital stock taxes for a certain year, for which services it agreed to pay a certain per cent. of the amount of tax saved under a certain sum, and subsequently the Supreme Court decided that the Board had no authority to assess the capital stock of mercantile corporations, which decision the Board followed, *held* that said company was not entitled to a percentage under the agreement, since the parties contemplated a tax would be levied on an assessment by the State Board, and that the action of the Board was the result of law rather than the company's efforts, the company having made the value of its services contingent upon something it could not perform.

The News Publishing Company, Defendant in Error, v. The Associated Press, Plaintiff in Error.

Gen. No. 19,778.

1. NEWSPAPERS, § 6*—*right to impose, discriminatory terms for news service.* Under the Illinois law, in compelling a newspaper company to accept excessive and unjust terms as a condition of obtaining news service is an actionable wrong.

2. APPEAL AND ERROR, § 1844*—*conclusiveness of decision on former appeal.* As to questions decided upon a former record as to a like statement of facts, the law declared in a former opinion of this court will be taken as the law in a review.

3. CONFLICT OF LAWS, § 12*—*law governing legality of news service contracts.* The wrong committed by a press association in requiring illegal exactions in a contract for news service becomes consummated at the time of the contract rather than at the time of the subsequent acts of payment or parting with property, so that the right of action, if any, is governed by the law of the place where the contract was made.

4. NEWSPAPERS, § 6*—*admissibility of evidence.* In an action to recover damages for an alleged illegal discrimination and exaction growing out of the by-laws of a press association, where the contract

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The News Pub. Co. v. The Associated Press, 190 Ill. App. 77.

was made without the State and not to be performed within the State, the exclusion of decisions of the *lex loci* is erroneous if the law therein stated was applicable and different from that of the forum.

5. CONFLICT OF LAWS, § 12*—*law governing legality of a news service contract.* If a press association may in New York lawfully impose conditions in its news service contracts which in other jurisdictions are declared illegal and as unjustly discriminating, the mere act of entering into the contract or negotiating for such conditions, whether they be called requirements or exactions, cannot be deemed illegal or tortious in New York, as the alleged tort, if any, is founded upon a contract, valid where made, and there can be no cause of action in a State where it is neither made or to be performed.

6. NEWSPAPERS, § 6*—*scope of law against discriminatory exactions in giving news service.* The law which prohibits those engaged in a business affected by a public interest from unjustly discriminating among those receiving news service is not a statutory enactment but a rule of the common law, and it is not local to the State or limited in its application to corporations, and cannot reasonably be invoked against a corporation where it would not be against others engaged in a business clothed with a public interest, unless there is something in its charter or the law under which it is incorporated that requires observance of such a distinction.

7. CONFLICT OF LAWS, § 1*—*extent of application of doctrine of comity.* While this State will not enforce by comity a contract made in a foreign State, or give effect to its laws, so as to defeat the public policy of this State, the rule is not applicable where a party to a contract made in a foreign State, not to be performed in this State, comes into the State not to enforce it but to effect a repudiation of it, as in such case he will be relegated to the laws where the contract was made or to be performed.

GRIDLEY, J., dissenting.

Error to the Circuit Court of Cook county; the Hon. CHARLES H. BOWLES, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed. Opinion filed December 22, 1914.

WILSON, MOORE & McILVAINE, for plaintiff in error;
N. G. MOORE, of counsel.

JOSEPH L. McNAB and TAPPAN GREGORY, for defendant in error; S. S. GREGORY, of counsel.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The News Pub. Co. v. The Associated Press, 190 Ill. App. 77.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

This writ of error seeks to reverse a judgment entered against the Associated Press (referred to as defendant) for \$23,025.40, in an action on the case brought by the News Publishing Company (referred to as plaintiff), publisher of the Milwaukee Daily News, against said Associated Press, Victor F. Lawson, its president, and two of its directors, to recover damages for alleged unlawful exaction, based on the following state of facts:

On March 26, 1894, the News Publishing Company became a member of the United Press, a rival news agency of the Associated Press, and entered into a contract therewith for news service, which the latter guarantied to furnish for the period of five years, and appended to the contract, virtually as a part thereof, was a written guaranty of performance of the obligations of the United Press under said agreement, purporting to be signed for certain New York papers or their publishers, towit: The Herald, The Tribune, The Sun and the New York Times Publishing Company. On March 31, 1907, the United Press notified the plaintiff and its other members that its services would be discontinued after April 7th. Under the necessity of obtaining adequate news service from the latter date, the News Publishing Company, through its president, Melvin A. Hoyt, entered into negotiations with Lawson, as president of the Associated Press, in New York City, resulting in the following application:

“TO THE BOARD OF DIRECTORS,
Associated Press, New York.

GENTLEMEN:

I hereby make application for a “B” membership in the Associated Press on the following terms in behalf of the Daily News of Milwaukee, Wisconsin. A payment to the Associate(d) Press of Ten Thousand Dollars in cash or Five Thousand Dollars in cash and

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a note for Five Thousand Dollars running one year at 6% interest, secured by my contract at my option, which I will exercise within thirty days from date.

Yours respectfully,

M. A. HOYT,

President, News Publishing Company."

New York, April 6, 1897."

On April 7th said board of directors passed a resolution granting the application and directing that the name of plaintiff be placed on its membership roll with the proviso that the \$10,000 be held in trust for distribution among its other members in Milwaukee. Under one of defendant's by-laws plaintiff could not become a member without their consent, which, it was understood, the Associated Press would obtain, using said sum for that purpose. On the day the resolution was passed, the contract for service (on a basis of specified rates and tolls not complained of) was signed and went into effect, and plaintiff received defendant's news service from that date. It was also required and agreed upon as a part of the transaction that plaintiff was to assign and surrender the "guaranties" aforesaid.

Acting upon the option provided for in said application, Hoyt, as president of the News Publishing Company, paid the \$10,000 in cash to Lawson in Chicago on April 12th, the latter giving a receipt to plaintiff for "its payment for membership in the Associated Press for the use of the day report of the Milwaukee Daily News," and at the same time delivering to Hoyt plaintiff's copy of the written contract for service, which, as we construe the application, was to be held merely as security for the note in case plaintiff elected to give one in accordance with its provisions. When said contract for service was signed, the News Publishing Company, by another written instrument, assigned to the Associated Press "all manner of action and actions, cause and causes of action, suits, debts," etc., it might have by reason of its agreement with the United

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Press. When the \$10,000 was paid to Lawson in Chicago, there was, at Lawson's request, executed and substituted for said assignment a new instrument, differing from the first only by adding "or upon or by reason of the guaranty of the New York Herald, New York Tribune, New York Sun, and the New York Times Publishing Company, of the performance of the said agreement by the said United Press." At the same time the so-called "guaranties" were surrendered. Both assignments were executed in the name of plaintiff by its president, Hoyt, the first in New York, the latter in Chicago. Both in New York and Chicago at the times of the respective transactions therein Hoyt protested against these requirements as conditions of plaintiff's obtaining defendant's service.

These are the main facts on which, from the point of view we take, our conclusion must rest. A more replete statement thereof is unnecessary, but will be found in *News Pub. Co. v. Associated Press*, 114 Ill. App. 241, where the judgment had in the first trial of the action was reversed because the court directed a verdict for the defendants instead of submitting the case to the jury. The record now before us is that of the second trial.

The gravamen of the action is an illegal exaction of an excessive and unlawful price as a condition for defendant's services. The primary and, as we view it, decisive question is whether there was a cause of action in the State of Illinois. To decide it requires us to determine what were the particular acts constituting the tort charged and where they took place. As summarized in one part of the declaration, the actionable wrong is that defendant "required the said plaintiff, as a condition of such membership and of the obtaining of the said news service, not only to pay said sum of \$10,000, but to surrender or assign to the said defendant, the Associated Press, all its right under the said contracts with the United Press upon or by reason of the guaranties" aforesaid.

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In the former decision above referred to, this court held on like evidence in most respects that there was an actionable wrong (p. 252); but the conclusion was reached upon application of the Illinois law. We there said that the basis of the action was "the wrong done appellant [News Publishing Company] at the time it was compelled to enter into the contract by reason of its necessities" (p. 256); and that the contract was a New York contract to be performed in Milwaukee, and should be construed according to the law of New York (p. 253), but in the absence of proof thereof presumed it to be the same as in Illinois. But in the record before us there was proof presented on that subject. Of course, as to the questions decided upon the former record as to a like state of facts, the law declared in the former opinion of this court must be taken as the law in this review. *Novak v. Rochester German Ins. Co.*, 156 Ill. App. 352.

Plaintiff contends, however, that whatever the prior contract, and notwithstanding it had already gone into effect, not until the money was paid and guaranties surrendered in Chicago was the wrong actually consummated and the cause of action perfect, and that, therefore, the law of Illinois controls the right of recovery. While plaintiff may not have suffered any actual damages until that time, yet the cause of action, if any, related back to the act from which they ensued,—the taking advantage of its necessities and compelling it to accept excessive and unjust terms as a condition of obtaining service. It was not the receipt of the unlawful price but the act of requiring and compelling it that was the essence of the wrong charged. In other words, the alleged wrong grew out of the contract, and not the act of payment or parting with property. This is in consonance with our former holding that the action was based upon the wrong done plaintiff "at the time it was compelled to enter into the contract by reason of its necessities." In this connection we held that payment made under compulsion, though made

subsequent thereto, could not be deemed voluntary so as to defeat a right of recovery, citing from *West Virginia Transp. Co. v. Sweetzer*, 25 W. Va. 434, where, in a suit brought to recover excessive freight charges, the Court said: "Nor should the fact that the freight had been delivered when the payment was made prevent such recovery." In a similar case (*Conn v. Louisville & N. R. Co.*, 21 Ky. Law Rep. 469) it was held on the question of determining where the action growing out of a contract of shipment should be brought that the place where the contract was made or to be performed, and not the place of paying the freight, was the controlling factor. If, therefore, we had not already so decided on the former appeal, we would nevertheless reach the conclusion that the alleged wrong to plaintiff was done in the State of New York; and whether the acts or transactions constituting it were tortious must be tested and controlled by the law of that State. *Christiansen v. William Graver Tank Works*, 223 Ill. 142, 150; *Mexican Cent. Ry. Co. v. Gehr*, 66 Ill. App. 173, 192.

It is also in consonance with our former opinion to hold that the acts or thing constituting the alleged illegal exaction cannot be considered as separate and apart from the contract entered into. It was one transaction whereby plaintiff contracted for and obtained news service from defendant, the consideration of which was the regular tolls or rates, and in addition thereto said sum of money and surrender of said guaranties. This, in fact, is the theory of the declaration. Whether these additional requirements, referred to as illegal exactions, were unlawful depends, therefore, upon said contract, which must, as said in the former appeal, be construed by the law of New York.

The illegality of said requirements is said to consist in this, that defendant was a *quasi* public corporation and as such bound not to exercise unjust discrimination in furnishing its news service. In this connection

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it should be borne in mind that the discrimination here charged grew out of the by-law aforesaid under which the alleged illegal exaction was made.

Bearing upon the question of the validity of said by-law and of the contract, defendant, upon the second trial, now under review, offered in evidence, as the law of New York governing the transactions in question, the decision in *Matthews v. Associated Press of New York*, reported in 136 N. Y. 333. The decision was excluded by the court and not construed and applied as requested, and error is assigned upon such action. This was error if the law therein stated was applicable and different from that in our own State.

In holding that there was actionable wrong, this court, in its former decision, applying to the transactions the law of this State, deemed the decision in *Inter Ocean Pub. Co. v. Associated Press*, 184 Ill. 438-449, as controlling (p. 251). In that case the Inter Ocean Publishing Company filed its bill for an injunction against the Associated Press to restrain it from suspending or expelling it from membership and from refusing to furnish it news under its contract, and from doing any act or thing to deprive it of the news gathered from other news agencies contrary to a certain by-law of the association which prohibited its members from purchasing news reports from other agencies. Such by-law was held to be null and void and beyond the power of the corporation to enact. In the New York case substantially the same questions were presented to the court. In that case also the plaintiffs were publishers of newspapers and members of the defendant Association, and sought the same relief upon an almost identical state of facts, involving the validity of a like by-law of the association prohibiting its members from receiving or publishing the news dispatches of any other association covering a like territory, etc. The question before the court was whether said by-law was legal and enforceable, the contention

being that the association had not the power to enact it. The power and by-law were upheld.

As to the state of facts and remedy sought, and also as to the character of the corporation sought to be enjoined, its objects and the nature of its business, the cases were alike and, therefore, presented for consideration and application the same questions of law. In the *Inter Ocean* case *supra*, the provisions of the by-law were held invalid as tending to create a monopoly in favor of the association and to prevent its members from procuring news from others engaged in the same character of work. It was there held that the business of the association was so impressed with a public interest that it could make no unjust discrimination among its members in its service. But the New York court deemed similar provisions a reasonable restraint upon the members of the association, consistent with its object and the business it was specially organized and incorporated to transact, and while it held that the by-law did not tend to establish a monopoly, and was not otherwise repugnant to the law of New York, it did not specifically discuss whether or not such association was a *quasi* public corporation, or whether, if so, such by-law operated to discriminate unjustly among its members; but, if it was an institution of that character, the court, under the law of that State, could take judicial notice thereof. *Eaton, Cole & Burnham Co. v. Avery*, 83 N. Y. 31-34. At any rate, if such question was involved in the *Inter Ocean* case, *supra*, it would seem that upon a like proceeding and state of facts it was also involved in the *Matthews* case, *supra*. We cannot properly assume that in reaching its decision the New York court did not take into consideration the nature of the business of the Associated Press, or that it would not have reached the same conclusion had the question of public interest been specially pressed upon its attention. We can only infer that in passing on the validity of the by-law it con-

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sidered the nature of the business and character of the corporation before it, whose corporate objects and business were expressly alluded to in its decision. If, therefore, such an association may in New York lawfully impose conditions in its service contracts, which are elsewhere classified as unjustly discriminating, then the mere act of entering into the contract or negotiating for such conditions, whether they be called requirements or exactions, cannot be deemed illegal or tortious in New York. The alleged tort is, in fact, founded on the contract. If the latter was legal, as it would seem to be in New York, where made, then there was no tort there, and no cause of action here.

The contention made here that the by-law in question was unjustly discriminating in its effect, was also made against the by-law in the *Inter Ocean* case. But if the by-law in the *Inter Ocean* case was nevertheless enforceable in New York, then by parity of reasoning the by-law here involved, being of the same character, would be enforceable there. We recognize, however, that the case at bar cannot be said to rest entirely upon the question whether the by-law in question was enforceable. While the requirement of \$10,000 was in pursuance thereof, that can hardly be said of the assignment or surrender of the guaranties. However, if on principle the association might lawfully require said sum as consideration for membership and entering into a contract for service, we see no reason why it might not also require such assignments.

It is also contended by plaintiff that the contract was not completed until the transactions took place in Chicago, namely, the payment of \$10,000, the assignment and delivery of the guaranties and the delivery of plaintiff's copy of the contract. In holding that the alleged tort took place in New York, we have practically considered and disposed of this contention. Neither the application for membership nor the agreement or consent to assign and surrender the guaran-

ties are to be viewed in the light of a separate agreement, but, as before stated, each is a part of one transaction. The payment of the one and the performance of the other were, as before stated, in reality but conditions of the contract of service and part of the consideration therefor. The only object of membership was to get the contract. After it went into effect, plaintiff paid part of the consideration agreed upon through such transactions. The application, in effect, provided for subsequent payment of the \$10,000, by giving an option to be exercised in thirty days as to the mode of payment. If plaintiff elected to give a note as therein provided for, then the contract was to be held as security for its payment. Having elected to pay all cash, the contract, or its copy thereof, was delivered to it. The new assignment was practically a mere substitution, without material modification, of the one executed and delivered in New York, and we fail to see that plaintiff, after said assignment, parted with any additional right by surrendering the original contracts or guaranties. In any event, the things done in Chicago are important here only as performances in the nature of making a deferred payment of part of the consideration for the real thing contracted for, and which plaintiff had already begun to receive,—news service from defendant.

To sustain a different construction, plaintiff's counsel refer to certain conversations which Hoyt claims he had with Lawson during the negotiations for the contract of service. But it is plain that they could not be received to vary the terms of the written instruments into which they were merged.

But it is contended by plaintiff's counsel that whatever the law may be in New York governing the subject, yet defendant being a corporation whose business is clothed with a public interest and being incorporated in this State, it carried into New York the same limitations as in Illinois in respect to its obligations to deal

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with all alike and without discrimination. In support of this contention it is argued "that the general laws of the State are in effect the charter of a corporation organized under them," and the charter being limited and modified thereby the corporation is subject to such limitations when it goes into another jurisdiction, and, therefore, cannot there enter into a contract that contravenes the general law or local policy of the State of its creation. But in *Warren v. First Nat. Bank of Columbus*, 149 Ill. 9, it was said (p. 25):

"The general laws and regulations of a State are intended to govern only within the limits of the State enacting them, and the State can have no power to give them extra-territorial force. Such provisions do not, as a rule, enter into contracts made within the State, if they are to be performed in another jurisdiction. It follows, therefore, that where a State statute is enacted for the enforcement of a local policy only, it will not be presumed that such statutory provision was intended by the State, or by the shareholders forming the corporation, to enter into the charter contract, and to regulate the company in its transactions outside of the State, and it will not affect the validity of the dealings of the company in foreign States."

We think this decision is conclusive of the question thus raised. We have carefully examined the authorities cited on this point by plaintiff but do not think they sustain its position or are at variance with the law as above stated. They go no further than to state the familiar proposition that where a corporation is formed under the general incorporation law, that law must be regarded as entering into and forming a part of its charter. But there is no express provision in the incorporation laws of this State or our statutes that imposes any special limitation upon corporations in relation to this matter, or that creates or indicates any local policy of this State in regard thereto. As said in *Raisor v. Chicago & A. Ry. Co.*, 215 Ill. 47: "In order to ascertain the policy of the State in respect to

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any matter, the acts of the legislative department must be looked to. It is not within the province of the courts to create public policy. Their province is limited to declaring it when ascertained." See also *Dougherty v. American McKenna Process Co.*, 255 Ill. 369, and *Carroll v. City of East St. Louis*, 67 Ill. 568.

But the law which prohibits those engaged in a business affected with a public interest from unjustly discriminating among those receiving their service is not a statutory enactment but a rule of common law. It is not local to this State, nor limited in its application to corporations. It cannot reasonably be invoked against a corporation where it would not be against others engaged in a business clothed with a public interest, unless there is something in its charter or the law under which it is incorporated that requires observance of such a distinction.

To be sure, it is settled law of this State that it will not, by comity, enforce here contracts made in a foreign State, or give effect to its laws, so as to defeat the public policy of this State. But that question is not presented on this record. It might be if the Associated Press were seeking to enforce against plaintiff the terms of the contract that are said to contravene our laws. The situation here, however, is entirely different. It is one in which a party to a contract made in a foreign State, not to be performed here, comes into this State, not to enforce said contract but to effect a repudiation of it. In such a case he will be relegated to the laws of the State where the contract was made or was to be performed. As said in *Northern Pac. R. Co. v. Babcock*, 154 U. S. 190, quoting from a decision of the Minnesota State court:

"Every day our courts are enforcing rights under foreign contracts where the *lex loci contractus* and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the State where made. To justify a court in refus-

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ing to enforce a right of action which accrued under the law of another State, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interests of our own citizens.”

. This contract was not one which could be said to be against good morals or natural justice or one which in anywise affected the status of the defendant corporation in this State, where it was created, or its relation to any citizen of this State, and no question is here raised, or properly can be on this record, that the execution of the contract in the State of New York was for the purpose of evading the law of this State.

We are compelled to hold, therefore, that tested by the New York law, which must control, there was no actionable wrong and, therefore, no cause of action here, and that the jury should have been instructed to render a verdict for defendant as requested. As, therefore, a reversal must necessarily follow, we refrain from discussing other questions raised on the record that might otherwise be deemed important.

Reversed.

MR. JUSTICE GRIDLEY dissenting. I am of the opinion that the judgment against the defendant, The Associated Press, should be affirmed.

The News Publishing Company, Appellant, v. Associated Press of Illinois et al., (Defendants), Victor F. Lawson, Appellee.

Gen. No. 19,764. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. CHARLES H. BOWLES, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed December 22, 1914.

Statement of the Case.

Action by the News Publishing Company a corporation, against the Associated Press of Illinois, Victor F. Lawson, its president, and two directors to recover an alleged unlawful exaction under a contract for news service. From a verdict and judgment in favor of defendant Lawson and against his codefendant, the Associated Press, the plaintiff appeals.

Plaintiff contended that defendant Lawson was the agent of the Associated Press in an illegal transaction, and equally guilty with it, and if the verdict was correct as to the Associated Press, it was inconsistent and wrong as to Lawson.

JOSEPH L. McNAB and TAPPAN GREGORY, for appellant; S. S. GREGORY, of counsel.

CALHOUN, LYFORD & SHEEAN, for appellee.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. TORTS, § 32*—*where judgment may be entered against one or more.* Where the declaration is not predicated upon the theory of principal and agent, but avers joint liability, under such an averment in a tort case one or more of the defendants may be found guilty or not guilty.

2. NEWSPAPERS, § 6*—*evidence insufficient to show illegal exaction for news service.* In an action to recover damages for an alleged unlawful exaction in a contract for news service, evidence held insufficient to support a verdict for the plaintiff irrespective of the court's finding that no cause of action existed in reviewing the record on a writ of error sued out by a defendant.

GRIDLEY, J., concurring specially.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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**August J. Austerlade, Administrator, Appellee, v.
Chicago City Railway Company, Appellant.**

Gen. No. 19,958.

1. **STREET RAILROADS, § 85***—*care required in case of frightened team.* The operator of a street car is under a duty to exercise reasonable and ordinary care under the circumstances to avoid the danger of frightening horses, and a street railway company is liable if the fright of a horse or team is caused by the making of unusual and unnecessary noises, or appearances, in the operation of its cars.

2. **STREET RAILROADS, § 85***—*sufficiency of evidence to establish liability for frightening animals.* Where plaintiff's intestate's death was due to his being thrown against and under a sweeper street car, while attempting to hold his team while standing in front of them, the evidence is *held* to show that the motorman might reasonably have anticipated danger from the frightened horses unless he reduced the speed of or stopped the car, and that if he did not actually observe their condition, he should have done so in time so as to avoid such danger.

3. **TRIAL, § 233***—*when pleadings may be taken by the jury.* While it is the better practice not to allow the declaration to be taken by the jury while endeavoring to reach a verdict, yet it is not reversible error to so allow.

Appeal from the Circuit Court of Cook county; the Hon. JOHN A. DOWDALL, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed December 22, 1914.

CHARLES LEROY BROWN, for appellant; LEONARD A. BUSBY, JAMES G. CONDON and WARNER H. ROBINSON, of counsel.

QUIN O'BRIEN, for appellee; MUNSON T. CASE, of counsel.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

This appeal is from a judgment recovered by appellee on account of the death of appellee's intestate, one

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Kroessin, alleged to have been caused by the negligence of appellant in running a snow sweeper under circumstances that caused the fright of a team of horses standing near the street curb and a consequent movement by them whereby said Kroessin, who was endeavoring to hold and govern them, was thrown on the car tracks in front of the sweeper, causing injuries from which he died.

We shall refer to appellee and appellant as plaintiff and defendant respectively.

The declaration is in four counts. The first two are predicated upon negligence by defendant's servant in continuing to run the snow sweeper at a high and dangerous rate of speed and with great noise towards and close to the team of horses when said defendant knew they were there, and that on account of the appearance of the snow sweeper and its noise when run, particularly at a high rate of speed, it was apt to scare horses. The first count contains the allegation that such running of the car was without warning (which was not essential to the cause of action, nor, in our opinion, sustained by the proof), and the second count charges that the servant knew, or in the exercise of reasonable care would have known, that the team was frightened and that said Kroessin was endeavoring to calm and hold them, but that, without waiting for them to be calmed and brought under control, continued to run the sweeper as aforesaid, knowing it was extremely dangerous so to do under such circumstances.

The third count is predicated upon the claim that the motorman knew, or in the exercise of reasonable care would have known, that plaintiff's intestate was thrown to the track in a position of peril in time for him to have stopped the car and avoided the accident. The fourth count is based upon the claim of wilful

and wanton negligence. We do not think the evidence is sufficient to sustain either of the last two counts.

The accident took place on Wentworth avenue in the city of Chicago, a street running north and south, between 72nd and 73rd streets, about 160 feet south of 72nd and opposite a house on the west side of Wentworth avenue known as No. 7216. Said Kroessin and his colaborer, Schibille, were engaged in delivering a stove at said house. Kroessin was the driver of the team. He had driven and stopped it alongside of the curb in front of the house with the horses facing north. Their tugs had been unloosened and the two men were engaged about their work when the sweeper approached from the north on the west tracks of the street. The sweeper, or car, in question differed in appearance from an ordinary car, mainly in the parts below the flooring, which was higher above the street than that of an ordinary car. There was a broom under each end placed diagonally across the bottom of the car, but not then in motion, and along the ends and part of the sides of which were canvass curtains with certain devices for fastening them a few inches above the rails.

On the occasion in question, in April, 1910, the sweeper, under the guidance of a motorman, was being taken to a barn for the purpose of storage. The evidence shows that it was going from eight to ten miles an hour, and produced an unusual noise (at least noticeably different from the ordinary street car), due to its peculiar structure or rattling of its parts, or the flapping of the curtains, or all of these. Plaintiff's witnesses laid much stress on the flapping of the curtains. Defendant, however, contended that they were securely fastened so as to prevent it. There was controversy as to whether the gong was continuously ringing.

Whatever may have been the facts with regard to these and other controverted questions of fact, the evi-

dence clearly shows that as the car crossed or left 72nd street, the horses became noticeably nervous and excited, raising, tossing and shaking their heads and quivering and moving about on their feet in a manner that indicated a serious state of fright. Their actions were observed not only by others, but by the motorman and his companion, and while the witnesses, as usual, varied somewhat in their descriptions, yet the entire testimony produces the conviction that their actions were such as gave the motorman timely warning of impending danger. He claimed that another sweeper passed them shortly before his did, that he observed their uneasiness then, but that they calmed down after it passed and did not indicate serious fright at the approach of his car. There was some controversy over the fact as to whether another sweeper did pass the horses. But, while that was one of the questions of fact for the jury, we think its importance is unduly magnified, for it would not necessarily follow that the second car could pass them without causing serious fright because the first did, when indications were to the contrary. The important fact was whether their actions were such as to indicate such serious fright as called for slowing or stopping the car before they were reached.

It appears that Kroessin, observing their freight, left the sidewalk or parkway near the curb, took hold of their reins near the bits and tried to hold and calm the horses as the sweeper in question approached; that the horses became more violent in their actions, and just about the time the car reached them, swung towards the car around to the side of the wagon, and in that movement threw Kroessin on the tracks immediately in front of the car or directly under the fore part of it; that the motorman, unaware of the accident, drove the car on until a cry on the street caused him to stop it about 170 feet farther south, and that Kroessin was there taken out from underneath it so injured

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that he died. We think there is a manifest preponderance of evidence that the cause of the fright was the combination of unusual noise and appearance of the car approaching with unslackened speed; that Kroessin stood in front of the horses, vainly trying to hold and calm them while the car was still many feet away; and that just before it reached them, they suddenly swerved, hurling him just in front of, instead of under the car; that the motorman saw, or could have seen by the exercise of reasonable care, that the horses were frightened at and becoming more violent by reason of the approach of his car; and that the state of facts was such as made it his duty to reduce the speed of the car or stop it altogether, if necessary, to enable the horses to be brought under such control that either they or the car could be moved without danger to life or property. There was no emergency or public requirement that rendered it impracticable to slow or stop the car. To have done so would not have interfered with either the public or defendant's convenience or interest. We think the evidence shows that the degree of the horses' fright was such that the motorman might reasonably have anticipated danger therefrom unless he reduced the speed of or stopped the car, and that if he did not actually observe their condition, he should have done so in time to control the car so as to avoid such danger.

Many decisions are cited on both sides bearing upon accidents of this character, where horses were frightened by approaching or passing street cars, but it would unduly prolong this opinion and subserve no particular purpose to analyze them. The facts vary in each case and the cases frequently turn on peculiar circumstances, or some material fact not present in the others. There is little, if any conflict, however, about the law pertaining to the nature or extent of the duty street car companies owe to those driving or using horses in the streets. The law applicable to

this state of facts is fairly summarized in the following language: "A motorman of an electric car, who sees a horse which appears to be restless or refractory, must manage the car in such a way as to relieve the traveler from his dilemma." 2 Nellis on Street Railways, sec. 395, (2nd Ed.); see also 2 Joyce on Electric Law (2nd Ed.) sec. 597. "It is the duty of the operator of a car to exercise reasonable and ordinary care under the circumstances to avoid the danger of frightening horses, and hence the company will be liable if the fright of a horse or team is caused by the negligent making of unusual and unnecessary noises, or appearances, in the operation of its cars." 36 Cyc. pp. 1488, 1489.

The duty of the street car company and its motorman has been so often set forth in decisions involving similar facts, and with such unanimity, that it is hardly necessary to refer to them. As said in a similar case (*Doran v. Cedar Rapids & M. C. Ry. Co.*, 117 Iowa 442): "The rule requiring the motorman of an electric car to do what he reasonably can to avoid a danger which is reasonably apparent seems to us too elementary to require elaborate citation of authorities. It would certainly not be necessary in all cases that the car be stopped as soon as it is evident that animals on the highway have become uneasy and even frightened, but it certainly is his duty to take reasonable steps by way of reducing the speed of the car to avoid an injury which he may anticipate as likely to result from the frightened condition of animals on the street." While in the case at bar the motorman claimed that he did reduce his speed, yet there was evidence tending to show that he did not do so, at least as soon as he should have done, and, of course, the question of what steps should be taken in the exercise of reasonable care in such a case by the motorman to avoid an accident is for the jury. 27 Am. & Eng. Encyc. of Law (2nd Ed.) 92; *Oates v. Metropolitan St. Ry. Co.*, 168 Mo.

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535; *Flewelling v. Lewiston & A. Horse R. Co.*, 89 Me. 585; *Cameron v. Jersey City H. & P. St. Ry. Co.*, 70 N. J. Law, 633; *Lightcap v. Philadelphia Traction Co.*, 60 Fed. 212; *McCann v. Consolidated Traction Co.*, 59 N. J. L. 481; *Springfield Consol. Ry. Co. v. Ankrom*, 93 Ill. App. 655; *Richter v. Cicero & P. St. Ry. Co.*, 70 Ill. App. 196; *Freyer v. Aurora, E. & C. Ry. Co.*, 123 Ill. App. 423. We are disposed to accept the verdict of the jury as decisive of the facts in this case, and think there was sufficient evidence to justify them in concluding that the motorman saw, or ought to have seen in time to avert any danger, that the horses were unduly frightened at his car and were likely to become unmanageable, and that he was negligent in not slackening the speed or stopping the car before he reached them. He had timely notice of their condition and, under the circumstances, should have anticipated the danger.

It is urged that the court erred in not eliminating the third and fourth counts from consideration by the jury. While we do not think there was sufficient evidence to base a verdict thereon, it cannot be said that there was no evidence tending to support them. For that reason there was no error in refusing defendant's instructions directed against them, or in sending the declaration to the jury because it contained such counts. While, as has been stated by our Supreme Court, it is the better practice not to allow the declaration to be taken by the jury while considering upon the verdict, yet it is not reversible error to allow it. (*Hanchett v. Haas*, 219 Ill. 546), unless possibly when it contains prejudicial counts which have previously been eliminated, which is not the case here. *Elgin, A. & S. Traction Co. v. Wilson*, 217 Ill. 47; *Chicago City Ry. Co. v. Reddick*, 139 Ill. App. 161.

Error is alleged in refusing the following instruction requested by defendant:

“4. If you believe from the evidence that the deceased ran out and grabbed the horses and thereby frightened them so as to cause them to swing around and throw him into the path of the car, and that the deceased in so doing failed to exercise ordinary care for his own safety, and if you further believe from the evidence that the accident in question would not have resulted but for the conduct and action of the deceased in so doing (if from the evidence you believe he so did), then you are instructed that the deceased was guilty of contributory negligence, and in such event the plaintiff cannot recover, even if you believe that the defendant or its servants were also guilty of negligence as charged in the declaration or some count thereof.”

Other instructions were given stating that plaintiff could not recover if deceased was not in the exercise of ordinary care. But it is claimed that defendant was entitled to this concrete application of its theory that deceased was guilty of contributory negligence in running towards the horses. The great preponderance of the evidence is that the deceased had reached the horses' heads and was holding them by the reins before the car got there and before they swerved. The evidence is so extremely slight and dubious on which this tendered instruction was predicated, that had it been the basis of an independent suit, no court would have permitted it to go to the jury. While we are aware that not quantity but quality of evidence furnishes the basis for such an instruction, when its quality is so weak that it will not reasonably support the theory on which an instruction is tendered, it is pressing the contention beyond reason to hold that the refusal of such an instruction is necessarily reversible error. In our opinion the evidence did not justify such a theory or such instruction. It is predicated upon the probable sudden movement of the deceased to grasp the horses before they could run away, in which act itself there was nothing to indicate negligence, but, on the contrary, commendable diligence and care, and on

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the conjecture rather than legitimate inference that otherwise the horses would necessarily have swerved towards the sidewalk instead of the street. The evidence is so preponderant and convincing that the deceased had reached the horses and was standing in front of them, holding them before they swerved, and that their movement was the culmination of a fright that began with the appearance of the car and continued, increasing in degree, until just before the car got to them, that it is impossible to believe that a jury could have given any such significance to the evidence of two of defendant's witnesses that deceased "ran" towards the horses that defendant now seeks to give it. To say that horses, quivering and swaying with excitement and shaking and raising their heads towards a strange object with flapping curtains coming rapidly towards them, would all at once forget the object of their fright and jump towards it because their own driver hurriedly caught them by the bits, presents too large a draft upon the imagination of one who knows anything about horses. The use of the word "ran" by these two witnesses who testified in behalf of defendant was not supplemented by any other testimony that indicated that the horses were frightened by deceased. One of these witnesses, who was riding on a car coming from the south, said: "My attention was first directed to the team because I saw them getting frightened at the sweeper. When they got frightened they started to turn right toward the sweeper, toward the track the sweeper was on." The other witness stood beside the motorman and said the deceased "ran" towards the heads of the horses, but he did not see him get hold of their heads. The motorman, testifying for defendant, said: "He moved slowly and walked up to them." Another of defendant's witnesses said: "He caught hold of the reins under the horses' neck. While he was doing this, the sweeper was coming along at the same rate of speed." Plaintiff's two witnesses testified that he was holding the horses by the head and when the car got to within

fifteen to twenty-five feet, they swerved around. There was virtually no difference in theory as to the cause of fright. All of defendant's own witnesses describe the horses as in a state of fright at the approaching car. Defendant's claim rests upon a mere scintilla of evidence and not on evidence that reasonably tends to support its theory. In that state of the testimony, we are not disposed to regard the refusal of such instruction as reversible error. But, if there was any ground whatever justifying submission of either the third or fourth count to the jury, then that instruction, without qualification was improper.

Error is also urged to the giving of the following instruction:

"8. The court instructs the jury that the law only required the deceased, Richard Kroessin, to exercise ordinary care for his own safety at and before the time he received the injury, and what is ordinary care depends upon the circumstances of each particular case, and is such care as a person of ordinary prudence would usually exercise under the same or similar circumstances."

In criticism of this instruction, it is said that it assumes a person of ordinary prudence would have permitted himself to be surrounded by circumstances similar to those permitted by deceased, and was prejudicial in that it diverted the jury's attention from defendant's contentions that the deceased was contributorily negligent, (1) in facing the horses with their left instead of their right sides towards the curb on that side of the street contrary to a city ordinance; and (2) in getting into the situation occupied by him at and before the time he received the injury. It expressly refers to the exercise of care "at and before the time he received the injury," and we do not think it was calculated to mislead the jury in other respects. In fact, one of defendant's own instructions on the same matter is equally subject to the same criticism. We think the judgment should be affirmed.

Affirmed.

Racine L. & Mfg. Co. v. G. W. White L. Co., 190 Ill. App. 102.

**Racine Lumber & Manufacturing Company, Defendant
in Error, v. G. W. White Lumber Company, Plain-
tiff in Error.**

Gen. No. 19,999.

1. CORPORATIONS, § 754*—*where service is ineffective to confer jurisdiction.* Where a contract with a nonresident plaintiff corporation was made and performed without the State and service was had upon a nonresident defendant corporation after it had ceased to do business in the State and had withdrawn and revoked the authority of its resident agent to be served, service of process upon such agent fails to give the court jurisdiction to render a valid judgment against the defendant nonresident corporation.

2. CONTRACTS, § 236*—*determination of place of execution and performance.* Where a contract was entered into through correspondence with defendant at its home office in another State and the correspondence with the local office was after the contract sued on was made and accepted, and it was admitted that the original order was made from a second State by mail sent to the home office, accepted and returned, and the subject-matter of the contract was shipped from the home office, but the correspondence in regard to the filling of the order was with the local office, *held* that the contract was made and to be performed without the State of the local office.

Error from the Municipal Court of Chicago; the Hon. OSCAR M. TORRISON, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded with directions. Opinion filed December 22, 1914.

PAM & HURD, for plaintiff in error; BURRELL J. CRAMER, of counsel.

MUSGRAVE, OPPENHEIM & LEE, for defendant in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

We shall designate the parties as known in the court below.

The question presented by this writ of error is whether jurisdiction was obtained of defendant against whom judgment was taken by default. Later defendant, specially appearing for such purpose, moved the court to vacate the judgment and quash the return of service. Both parties were nonresident corporations, plaintiff having been incorporated in Wisconsin and defendant in Indiana. The return showed service on one McChesney, vice-president of defendant, April 23, 1913. Defendant was licensed to do business in this State the year before, and, pursuant to the provisions of our statute relating thereto, designated said McChesney as the person on whom service could be had in all suits commenced in this State, but it discontinued its Chicago office at the end of 1912. On March 13th, its Illinois license was cancelled. On April 17th, McChesney ceased to be vice-president. His services as local agent for the defendant in Illinois ceased about the time of the discontinuance of the Chicago office. Action was formally taken by the stockholders of the company January 10, 1913, ratifying such discontinuance.

The question arises, therefore, whether under such circumstances the revocation of the agent's authority rendered the service on him ineffectual. As to where the contract sued on was made, counsel before us disagree. But we think an admission of counsel for plaintiff removes any doubt on that subject. The record shows that after counsel for defendant contended that the contract was entered into through correspondence with defendant at its home office in Indiana and that the correspondence with the local office in Chicago was after the order sued on was made and accepted, counsel for plaintiff admitted that the original

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order was made by plaintiff "at Racine, Wisconsin, forwarded in the mails, sent to Spencer, Indiana, accepted by mail and returned to Racine," but added, "that in regard to the filling of the order, the lumber was shipped from Indiana, but the correspondence was with the Chicago office." The correspondence referred to was not put in evidence, and plaintiff now claims that the last part of the admission shows that the transaction sued on was in the State of Illinois. We cannot agree with this contention. The admission clearly shows that the contract was made and was to be performed outside of the State of Illinois, and that correspondence was had thereafter relating to carrying out the contract. That being the case, the authorities relied upon by plaintiff are not applicable. They do not relate to a state of facts like those at bar where it appears that the transaction did not take place in or with a citizen of the State in which jurisdiction of the court was sought.

The purpose of statutes requiring foreign corporations to appoint persons upon whom service may be had is important in this connection. It is succinctly stated in *Mutual Reserve Fund Life Ass'n v. Phelps*, 190 U. S. on page 158, as follows: "This and other kindred statutes enacted in various States indicate the purpose of the State that foreign corporations engaging in business within its limits shall submit the controversies growing out of that business to its courts, and not compel a citizen having such a controversy to seek for the purpose of enforcing his claims the State in which the corporation has its home."

This case is cited by defendant. But there the defendant, a foreign corporation, was still doing business in the State although its license so to do had been revoked, the plaintiff was a citizen of the State, and the cause of action arose out of transactions between the parties while the defendant was carrying on business in the State under a license from it. Under such circumstances service on the person au-

thorized to receive it prior to revocation of the license was deemed good.

We think the question here involved, however, is settled by the decisions in the case of *Hunter v. Mutual Reserve Life Ins. Co.*, 184 N. Y. 136, affirmed in 218 U. S. 573. That was a suit brought in New York by a resident of North Carolina upon judgments obtained in the latter State against said insurance company which was organized under the laws of the State of New York. The service on which such judgments were procured was made on the statutory agent after the company had ceased to do business in North Carolina, had withdrawn from the State and had revoked the authority given by it for such service. These judgments were based on five insurance policies issued by the insurance company,—one to a resident in North Carolina while it was doing business there and the others to residents of New York and New Jersey, who long after defendant had attempted to withdraw from business in North Carolina, assigned their claims to residents of that State. The judgment on the policy issued to the resident of North Carolina was not questioned, but the judgments on the other policies were held to have been obtained without jurisdiction. Referring to statutes relative to obtaining service on foreign corporations, the Court said that they “have always been regarded as primarily designed for the protection of citizens of the State enacting the legislation and who might acquire rights under contracts executed with them or for their benefit while they were such citizens.” As to the insurance company’s right to revoke the authority for service upon it in North Carolina, the Court said that citizens of that State, who had taken contracts from the defendant while it was doing business there in reliance upon the power of attorney authorizing such service, were entitled to have it remain unrevoked because they were regarded as having made contracts upon the faith of it, but that the as-

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signee of the claims or contracts growing out of the New York and New Jersey policies occupied no such position; that they were not of the class for whose protection the authority for service was originally executed. The decision of the United States Supreme Court, after a thorough review of several cases relating to this subject (many of them cited here by defendant in error), and the distinctions to be drawn between them, sustains the reasoning of the New York court. Here no citizen of this State is interested. The contract was entered into and to be performed outside of this State and between nonresident parties. Under such circumstances the authority was revocable and no jurisdiction of the court was obtained by such service, as McChesney was no longer its agent for service or an officer of the company. The court, therefore, erred in overruling the motion to vacate the judgment and quash the return of the summons. The judgment will be reversed and the cause remanded with directions to grant such motion.

Reversed and remanded with directions.

**H. S. Richardson Coal Company, Plaintiff in Error,
v. Anton J. Cermak and William Hereley Com-
pany, Defendants in Error.**

Gen. No. 20,021.

1. FRAUDULENT CONVEYANCES, § 15*—*scope of Bulk Sales Act.* The Bulk Sales Act (Hurd's R. S. 1913, ch. 38a, ¶¶ 4, 5,) relates to a business or trade where, in the ordinary course and regular prosecution thereof, the goods or chattels are not ordinarily and regularly sold by the owner in bulk.

2. FRAUDULENT CONVEYANCES, § 15*—*scope of Bulk Sales Act.* The Bulk Sales Act (Hurd's R. S. 1913, ch. 38a, ¶¶ 4, 5,) is held not to apply to a sale of a team of horses, including harness and wagon,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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used personally by the vendor in hauling coal for others at a compensation of so much per ton.

3. FRAUDULENT CONVEYANCES, § 15*—*property not affected by Bulk Sales Act.* The Bulk Sales Act (Hurd's R. S. 1913, ch. 38a, §§ 4, 5) does not contemplate that one called upon to render personal services cannot sell chattels, goods or things appurtenant thereto unless its conditions are complied with.

4. FRAUDULENT CONVEYANCES, § 15*—*property excluded from operation of Bulk Sales Act.* Where the vendee of a team of horses and harness and wagon replevined them when levied upon as the property of the vendor, the sale of such property was not void for want of the statement and notices as required by Hurd's R. S. 1913, ch. 38a, §§ 4, 5.

Error to the Municipal Court of Chicago; the Hon. JOHN K. PRINDIVILLE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed. Opinion filed December 22, 1914. Rehearing denied January 5, 1915.

HENRY D. COGHLAN, for plaintiff in error.

LEVISOHN & LEVISOHN, for defendants in error.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

The only question presented on the record is one of law, whether what is known as the Bulk Sales Act of 1913 (Hurd's R. S. 1913, p. 906, ch. 38a, §§ 4, 5,) applies to a sale of a double team of horses, including harness and wagon, which the vendor had been personally using to haul coal for others at a compensation of so much per ton.

The case was a replevin suit, tried before the court without a jury, and the court refused to hold as law a proposition submitted by plaintiff to the effect that said act does not apply to such a sale or transfer, and gave judgment for defendant. We think the court erred.

The act renders fraudulent and void as against the creditors of a vendor, unless the vendee complies with certain conditions therein named, "the sale, transfer

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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or assignment in bulk of the major part or the whole of a stock of merchandise, or merchandise and fixtures or other goods and chattels of the vendor's business, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the vendor's business'' and was construed in *G. S. Johnson Co. v. Belosky*, 263 Ill. 363, as prohibiting the sale of any goods and chattels in bulk otherwise than ''in the ordinary course of trade in the regular prosecution of business,'' and it must be presumed, we think, to relate to a business or trade where, in the ordinary course and regular prosecution thereof, the goods or chattels, whatever they might consist of, are not ordinarily and regularly sold by the owner in bulk.

But here the vendor was working for wages, and under the Act of June 21st, in force July 1, 1895, (Hurd's R. S. 1913, p. 1246) the services of his team may be included in a judgment for wages, where it is necessary to the performance of his labor. Manifestly the act did not contemplate that one called on to render personal services cannot sell the chattels, goods or things that are appurtenant thereto unless the conditions imposed by said act are complied with. Otherwise a lawyer could not sell his library, a surgeon his instruments, a broker his office furniture, or a carpenter his tools, without compliance with such conditions. If such were the proper interpretation of the act, we could hardly imagine a more burdensome restriction upon one's property rights.

The sale was not void for want of the statement and notices required by the act, but with delivery of possession passed title to the replevined property to plaintiff in error, the vendee, from whom it was taken by defendants in error on an execution levied against the property of the vendor. As plaintiff in error still retains possession of the property, the judgment below will be reversed and judgment will be entered here in its favor.

Reversed.

City of Chicago, Defendant in Error, v. John Niesdesmialek, Plaintiff in Error.

Gen. No. 20,045. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. DAVID SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed December 22, 1914.

Statement of the Case.

Action by the City of Chicago against John Niesdesmialek. From a judgment in favor of the plaintiff defendant brings error.

A. S. LAKEY, for plaintiff in error.

WILLIAM H. SEXTON and JAMES S. McINERNEY, for defendant in error; ALBERT J. W. APPELL, of counsel.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

MUNICIPAL COURT OF CHICAGO, § 26*—*insufficiency of statement of facts.* A "statement of facts" consisting of a mere narrative of witnesses' testimony, or its substance, will be stricken from the record upon motion, since such a document does not meet the requirement of the Municipal Court Act, § 23, ¶ 6, (Hurd's R. S. 1913, ch. 37, § 286, J. & A. ¶ 3335), and assignments of error based entirely upon such a document cannot be considered on appeal.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Gathemann v. Rosenfeld, 190 Ill. App. 110.

Ludwig A. D. Gathemann, Plaintiff in Error, v. Samuel Rosenfeld, Defendant in Error.

Gen. No. 20,115. (Not to be reported in full.)

Error to the Superior Court of Cook county; the Hon. CLARENCE N. GOODWIN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed December 22, 1914.

Statement of the Case.

Action by Ludwig A. D. Gathemann against Samuel Rosenfeld to recover damages resulting from the presence of gaseous fumes in a bathroom of demised premises from the use of a gas water heater without a proper vent pipe connection. The plaintiff was a tenant of defendant. Plaintiff's demurrer to defendant's plea of the statute of limitations was overruled and upon his electing to stand by his demurrer, judgment was entered for defendant. Plaintiff brings error.

CHARLES J. TRAINOR, for plaintiff in error.

KRAUS, ALSCHULER & HOLMES, for defendant in error; THOMAS J. LAWLESS, of counsel.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 257*—*necessary allegations*. In an action by a tenant for damages caused by gaseous fumes, an allegation that the tenant did not know the danger of using a water heater does not show that the tenant had a right to rely on the existence of a vent pipe or connection therewith, and states nothing for which the landlord was responsible.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Baird v. Nelson, 190 Ill. App. 111.

2. LANDLORD AND TENANT, § 257*—*allegations necessary to charge landlord for defective gas pipe.* In an action by a tenant to recover for damages resulting from gaseous fumes, where the declaration failed to disclose any defect in the vent pipe or, if one, that it was concealed, or that knowledge of it was chargeable to the landlord, or that it was not discoverable or ascertainable by the tenant, it lacks the elements essential to such a cause of action.

3. LANDLORD AND TENANT, § 257*—*what a new cause of action.* Where an amended declaration sets up the negligence of the landlord in failing to warn or inform the tenant of a defect in demised premises, and the dangers connected therewith, after the landlord knew of them, instead of as previously alleged, the landlord's failure to use a vent pipe connection for a gas heater, and his permitting its use by the tenant, it constitutes a different cause of action such as is barred by the statute of limitations.

Frank T. Baird, Defendant in Error, v. Gustav K. Nelson, Plaintiff in Error.

Gen. No. 20,141. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH E. RYAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed. Opinion filed December 22, 1914.

Statement of the Case.

Action by Frank T. Baird against Gustav K. Nelson for real estate commissions alleged to be due for procuring a purchaser for defendant's premises. From a judgment against defendant in favor of plaintiff, defendant brings error.

MARTIN & MARTIN, for plaintiff in error.

FRANCIS A. McDONNELL, for defendant in error.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Kubasiak v. Los, 190 Ill. App. 112.

Abstract of the Decision.

BROKERS, § 51*—*what constitutes procuring cause of sale.* Where it appeared that the owner and purchaser of property were brought together through an agent in June, 1912, when the sale was effected, and plaintiff had submitted the property to the same party about April, 1911, but negotiations for its sale ceased after September, 1911, and plaintiff never disclosed the name of the prospective purchaser to the owner or his agent, nor the name of the owner to the prospective purchaser, though requested to do so, and the prospective purchaser did not accept the terms submitted by the plaintiff, the evidence is *held* to show that the negotiations between the plaintiff and the purchaser were abandoned and that the plaintiff's efforts were not the procuring cause of the sale such as to entitle him to recover commissions.

**Frank Kubasiak, Defendant in Error, v. Louis D. Los,
Plaintiff in Error.**

Gen. No. 20,165. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH E. RYAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed December 22, 1914.

Statement of the Case.

Action by Frank Kubasiak against Louis D. Los for the return of money alleged to be withheld. From a judgment in favor of plaintiff, defendant brings error.

Defendant contended that the money was given him in payment of services rendered under a contract with plaintiff to collect an insurance policy. On the death of his wife, plaintiff became entitled to seven hundred and fifty dollars as beneficiary to insurance in a fraternal organization. Defendant was the local manager

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

of the organization. His duties were merely to obtain new members and to collect dues during the first five months of their membership. His sole compensation was a commission derived from the business he procured.

ALBERT H. FRY, for plaintiff in error.

MAX L. KASMAR, for defendant in error.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

PRINCIPAL AND AGENT, § 41*—*legality of agent's contract to collect insurance policy.* The evidence is held not to justify a holding, as a proposition of law, that defendant could not enter into a legal contract with plaintiff to collect an insurance policy in a fraternal organization, since it does not appear that the defendant, as local manager, sustained any relation of a fiduciary character with the organization.

Margaret Moore, Plaintiff in Error, v. Chicago City Railway Company, Defendant in Error.

Gen. No. 20,187. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH SABATH, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed December 22, 1914.

Statement of the Case.

Action by Margaret Moore against the Chicago City Railway Company for personal injuries sustained in

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.
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alighting from a street car. From a judgment in favor of defendant, plaintiff brings error.

Plaintiff and three other passengers testified to the occurrence. Defendant had no witnesses to the *res gestae*. It was contended that there was such inherent improbability and conflict in the testimony given in behalf of the plaintiff that the jury were justified in rejecting her theory of the accident and may well have believed that she attempted to alight from the car before it stopped.

N. J. SHUPE, for plaintiff in error.

WARREN D. BARTHOLOMEW and FRANK L. KRIETE, for defendant in error; W. W. GURLEY and J. R. GUILLIAMS, of counsel.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

STREET RAILROADS, § 131*—*when verdict is against weight of evidence.* Where a passenger testified that she was assisted off a street car by the conductor and that the car started while she had only one foot on the ground and still had hold of the car handle, and she fell on her side receiving certain bruises, and two passengers who got off the front end of the car testified that she had fallen on the street and the car suddenly stopped shortly thereafter leaving her on the ground four or five feet back of the car, and the plaintiff's testimony was corroborated in other particulars, the verdict for the defendant is *held* to be against the weight of the evidence.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**John E. Nyman and Hal N. Orr, Defendants in Error,
v. Ferdinand G. Gasche and Mrs. Ferdinand G.
Gasche, Plaintiffs in Error.**

Gen. No. 20,208. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. DAVID SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed December 22, 1914. Rehearing denied January 5, 1915.

Statement of the Case.

Action by John E. Nyman and Hal N. Orr against Ferdinand G. Gasche and Mrs. Ferdinand G. Gasche for dental services rendered to the latter. From a judgment in favor of the plaintiffs, defendants bring error.

Assignments of error were predicated on the alleged insufficiency of the evidence bearing on the questions whether the contract for services was with one or both of the plaintiffs and whether there was a breach of contract and failure to perform on their part.

KNAPP & CAMPBELL, for plaintiffs in error; JOHN R. COCHRAN, of counsel.

ROSENTHAL & HAMILL, for defendants in error.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. TRIAL, § 199*—*effect of conflicting evidence on motion for directed verdict.* A motion for a directed verdict is properly overruled where the evidence is conflicting.

2. APPEAL AND ERROR, § 601*—*necessity for preservation of motion for new trial for review of sufficiency of evidence.* The weight or

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

De Wolf v. Springer, 190 Ill. App. 116.

sufficiency of the evidence will not be considered in the absence of the proper preservation of a motion for a new trial.

3. APPEAL AND ERROR, § 800*—*insufficiency of transcript to preserve ruling on motion.* The failure to preserve a motion for a new trial on the ground of the weight or sufficiency in the bill of exceptions is not obviated by a recital in the clerk's transcript that such a motion was made and overruled.

4. INSTRUCTIONS, § 133*—*presentation of opposing theories.* An instruction framed to present plaintiffs' theory of the case and not that of defendants', which is presented by other instructions given at defendants' request, is not erroneous.

Wallace L. De Wolf et al., Appellees, v. Marguerite Springer, Executrix, Appellant.

Gen. No. 20,220. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed December 22, 1914.

Statement of the Case.

In an action by Wallace L. DeWolf and others against Marguerite Springer, as executrix, an order entered found due from Warren Springer in his lifetime the sum of \$25,000, and provided, "that judgment be and the same is hereby entered upon said finding against the estate of said Warren Springer, deceased, and against said Marguerite Springer as executrix of the last will and testament of the said Warren Springer, deceased." Such order was amended by striking out the words "estate of said Warren Springer, deceased," and adding "as a claim of the seventh class to be paid in due course of administra-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

tion.” The defendant appealed and questioned the power to amend such judgment subsequent to entry.

EUGENE M. BUMPHREY, for appellant.

GEORGE W. WILBUR, for appellees.

MR. PRESIDING JUSTICE BARNES delivered the opinion of the court.

Abstract of the Decision.

1. JUDGMENT, § 256*—*what amendment may be allowed after term.* An amendment to a judgment against the estate of a person and against the executrix of such person by striking out the words as to the estate and adding words requiring the claim “to be paid in due course of administration,” makes a change in a matter of mere form and not of substance, and such amendment may be made after the term from the pleadings and files in the case and the entries in the clerk’s minute books.

2. EXECUTORS AND ADMINISTRATORS, § 272*—*when claim against estate may be classified in judgment.* The classification of a claim against a deceased person in a judgment is a matter of form and is proper under the statutes as to the allowance of claims against estates.

3. JUDGMENT, § 252*—*when judgment may be amended after term.* Consent to the entering of a judgment against an estate goes to the substance rather than to the form of the judgment, and the court may under the statute of amendments and jeofails, correct such judgment in order to render it effective “so that it shall not be reversed and annulled.”

Edward J. Toolan, Defendant in Error, v. Chicago Daily News Company, Plaintiff in Error.

Gen. No. 19,512. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HARRY P. DOLAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed with finding of facts. Opinion filed December 22, 1914.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Toolan v. Chicago Daily News Co., 190 Ill. App. 117.

Statement of the Case.

Edward J. Toolan, plaintiff, commenced a fourth-class action in the Municipal Court of Chicago to recover damages for personal injuries against the Chicago Daily News Company, a corporation, and S. N. Pierson, Henry Pierson and Charles B. Pierson, trading as S. N. Pierson & Sons, defendants. The joint appearance of all the defendants was entered and the cause submitted to the court for trial without a jury. At the close of the plaintiff's evidence the suit was dismissed as to the three Piersons and the trial proceeded against the News Company as sole defendant. At the close of all the evidence the court found the News Company guilty as charged, and assessed plaintiff's damages at one hundred dollars in tort. After overruling a motion for new trial, the court entered judgment on the finding against the News Company and the defendant brought error.

MATZ, FISHER & BOYDEN, for plaintiff in error.

No appearance for defendant in error.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

1. MASTER AND SERVANT, § 838*—*when master liable to third person for servant's negligence.* A master is the person who has the choice, control and direction of the servant, and such master is liable to strangers for the negligence of his servant unless he abandons control to another who hires the servant.

2. MASTER AND SERVANT, § 867*—*when evidence insufficient to show liability of master to third person.* In an action by a driver of a vehicle for injuries sustained in a collision, where it appeared that the defendant, a newspaper company, leased the wagon which caused the injury under an arrangement whereby the driver of the wagon was paid by the lessor, who was reimbursed by defendant;

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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but such wagon was also used by another newspaper company, the defendant in turn being reimbursed for such use; and at the time of the collision the wagon was being used by the other newspaper company instead of the defendant, a finding that the relation of master and servant existed between the defendant and the driver of the wagon at the time of the collision was not justified by the evidence.

George P. Bent Company, Defendant in Error, v. Michael Zimmer, Sheriff, et al., Plaintiffs in Error.

Gen. No. 19,604. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOHN K. PRINDIVILLE, Judge, presiding.. Heard in the Branch Appellate Court at the October term, 1913. Reversed and remanded. Opinion filed December 22, 1914.

Statement of the Case.

The George P. Bent Company, a corporation, instituted a replevin suit against Kate Franklin for the recovery of a piano, and such piano was taken under the writ and delivered to the Bent Company. On the trial of the suit the Bent Company took a nonsuit, and the court ordered that a writ of *retorno habendo* issue for the return of the piano to Kate Franklin and that she recover costs and have execution therefor. Subsequently the sheriff in execution of said writ took the piano from the Bent Company, and while the piano was in his possession the Bent Company instituted this replevin suit to recover such piano, against Michael Zimmer, sheriff of Cook County, Kate Franklin and H. O. Franklin. The replevin writ was directed to the bailiff of the Municipal Court and he replevined the piano, the writ being served on the sheriff, but not on the Franklins. Subsequently the sheriff entered his ap-

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pearance and in his affidavit of merits alleged that he was lawfully in possession of the piano under the writ of *retorno habendo*. The trial was postponed for notice by publication to the Franklins and when they did not appear they were defaulted. On the trial a judgment was entered on a finding that the Bent Company was entitled to possession of the piano and this writ of error was brought.

WILLIAM A. ROGAN and JOHN G. PETTEYS, for plaintiffs in error.

W. KNOX HAYNES and MICHAEL FEINBERG, for defendant in error; MICHAEL FEINBERG, of counsel.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

REPLEVIN, § 124*—*when finding as to right to possession not sustained by evidence.* A finding in a replevin suit that a plaintiff was entitled to possession of a piano is not supported by the evidence, where it appeared that the defendant was a sheriff who had taken temporary possession of such piano under a writ of *retorno habendo* issued in a prior replevin suit, since such temporary possession of the sheriff was lawful, and where it also appeared that the evidence was insufficient to show that the plaintiff was lawfully entitled to possession.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

George H. Schneider and Homer H. Schneider, trading as G. H. Schneider & Company, Defendants in Error, v. Robert Commons, Plaintiff in Error.

Gen. No. 20,000. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HENRY C. BEITLER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed December 22, 1914.

Statement of the Case.

George H. Schneider and Homer H. Schneider, real estate brokers, trading under the firm name of G. H. Schneider & Company, commenced a fourth-class action in the Municipal Court of Chicago against Robert Commons, defendant, to recover one hundred and fifty dollars as commissions for procuring a purchaser for defendant's premises. The case was tried before a jury, resulting in a verdict for the plaintiffs and assessing their damages at one hundred and fifty dollars, upon which verdict judgment against the defendant was entered, and he brought error.

N. M. JONES, for plaintiff in error.

HOMER H. SCHNEIDER and JONES, KERNER & POSVIO, for defendants in error; DE WITT C. JONES, of counsel.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

1. BROKERS, § 90*—*when evidence shows right to compensation.* In an action by brokers for commissions for procuring a purchaser for real estate, evidence held to show that the plaintiffs were ver-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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bally authorized to sell the land, that they found a purchaser ready, willing and able to buy, and that the defendant refused to consummate the sale, wherefore the plaintiffs were entitled to commissions.

2. **BROKERS, § 47***—*what authority necessary to sell land.* A real estate agent who procures a purchaser ready, willing and able to buy is entitled to commissions when the principal refuses to sell, even though such agent is not authorized in writing to sell and his acts are not ratified in writing.

Voightman & Company for use of Watson Solar Window Company, Defendant in Error, v. Guaranty Construction Company and E. F. Hamm, Plaintiffs in Error.

Gen. No. 20,034. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. RUFUS T. ROBINSON, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed December 22, 1914.

Statement of the Case.

The Watson Solar Window Company commenced an action against the Guaranty Construction Company, a corporation, and E. F. Hamm to recover the sum of \$686 for certain art metal doors furnished in accordance with a contract made by and between the Construction Company and the Watson Company, by Voightman & Company, its selling agents. The action was based on section 28 of the Mechanics' Liens Act of 1903, (J. & A. ¶ 7166), authorizing suits against the owner and contractor jointly. Subsequently the records, papers and proceedings were amended on motion of the plaintiff, so as to read "Voightman & Company for use of Watson Solar

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Voightman & Co. v. Guaranty Const. Co. et al., 190 Ill. App. 122.

Window Company.” The defendant Hamm denied knowing by whom the doors were installed, or of the relation between Voightman & Company and the Watson Company, and denied service of a mechanic’s lien notice as required by law, and the Construction Company also denied its liability. The case was tried before the court without a jury, and the issues being found in favor of the plaintiff, its damages were assessed at \$714.82, the full amount of the claim with interest. It was also found that the plaintiff was a subcontractor and entitled to a lien upon the premises, and judgment being entered on such findings, the defendants brought error.

ADAMS, CREWS, BOBB & WESCOTT, for plaintiffs in error.

BELL & CROSS, for defendant in error.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

1. MECHANICS’ LIENS, § 1*—*what is nature of lien.* A mechanic’s lien is in derogation of the common law, is opposed to common right and cannot be given except when authorized by the provision of a statute strictly construed.

2. MECHANICS’ LIENS, § 207*—*when joint judgment authorized.* Under section 28 of the Mechanics’ Liens Act of 1903, (J. & A. ¶ 7166), the trial court may enter a joint judgment against the owner and contractor if the subcontractor establishes its right to a lien on the premises, and such section authorizes a suit against the owner and contractor jointly if money is due the subcontractor and is not paid within ten days after its notice was served as provided in sections 5, 24, 25, 27, (J. & A. ¶¶ 7143, 7162, 7163, 7165).

3. MECHANICS’ LIENS, § 207*—*what must be shown to authorize joint judgment.* Where the evidence failed to show that a subcontractor served a notice of lien on the owner as required by section 24 of the Mechanics’ Liens Act (J. & A. ¶ 7162), within sixty

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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days after completion of its contract, or that such owner dispensed with the necessity of notice, or that the contract was in fact completed, or that the owner was indebted to the original contractor when a notice was given, or that the suit was commenced within four months after final payment was due the subcontractor, the court was not authorized to enter a judgment against the owner and contractor for materials furnished and establishing a lien therefor, under section 28 of the Mechanics' Liens Act, (J. & A. ¶ 7166).

4. APPEAL AND ERROR, § 909*—*what must be included in transcript.* The Appellate Court cannot take judicial notice of rules of the Municipal Court not incorporated in the transcript.

Photo Cines Company, Defendant in Error, v. American Film Manufacturing Company, Plaintiff in Error.

Gen. No. 20,057.

1. APPEAL AND ERROR, § 578*—*when exception to judgment necessary.* Section 23 of the Municipal Court Act of 1905 as amended in 1907, (J. & A. ¶ 3335,) which has reference to the prosecution of writs of error in cases of the fourth and fifth classes, does not authorize the Appellate Court to review the evidence in a fourth class case tried without a jury to determine whether a judgment is against the weight of the evidence where there is no formal exception to the judgment.

2. APPEAL AND ERROR, § 551*—*how statutes as to exceptions are construed.* The second clause of section 81 of the Practice Act as amended in 1911, (J. & A. ¶ 8618,) as to exceptions during the progress of any trial, and sections 82 and 83, (J. & A. ¶¶ 8619, 8620,) authorizing the allowance of an exception to a final judgment of the court in a case tried without a jury, are to be construed together.

3. APPEAL AND ERROR, § 551*—*when exception during trial is necessary.* Under section 81 of the Practice Act as amended in 1911, (J. & A. ¶ 8618,) as to exceptions during the progress of any trial, the word "trial" means a judicial examination of the issues between the parties, and such section is not strictly construed.

4. APPEAL AND ERROR, § 551*—*when exception is necessary.* Section 81 of the Practice Act, (J. & A. ¶ 8618,) providing for a review

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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of any matters at the trial, upon which the court rules adversely, without formal exception thereto, is not confined to a ruling made before the court has pronounced the finding, and does not exclude the judgment or decision of the court, it being the evident intent of the legislature to provide a method for the review of causes without the necessity of the record disclosing that a formal exception was taken at the time to the adverse ruling upon which error is assigned.

5. APPEAL AND ERROR, § 578*—*when court may review evidence.* In an action of the fourth class before the Municipal Court of Chicago, where the case was tried by the court without a jury, and where the defendant objected to a finding against it and moved for a new trial, the Appellate Court was authorized to determine whether such finding was against the weight of the evidence, where the stenographic report of the trial complied with section 81 of the Practice Act, (J. & A. ¶ 8618,) but did not show that the defendant excepted to the entry of the judgment.

6. SALES, § 267*—*when warranty is violated.* In an action to recover damages for breach of an oral contract to purchase raw cinematograph film, the evidence was held to show that such film was purchased under an express warranty, that the same was first class and of good quality, and also under an implied warranty that it was merchantable and fit for the defendant's use, and since such film did not comply with the warranties, the defendant was not liable for film shipped after notice to the plaintiff not to make further shipments.

7. SALES, § 404*—*when evidence will warrant recovery for breach of warranty.* In an action for damages for breach of an oral contract to purchase raw cinematograph film, a finding in favor of the plaintiff was held not warranted by the evidence, since the evidence as to damages was not sufficiently definite to warrant such finding, and since it was not sufficiently shown that the plaintiff in making a resale of film, which the defendant refused to accept, did so to the best advantage of the defendant.

BARNES, P. J., concurring specially.

Error to the Municipal Court of Chicago; the Hon. JOSEPH S. LA BUY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed December 22, 1914. Rehearing denied January 5, 1915.

JAMES P. GRIER and DAYTON OGDEN, for plaintiff in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Photo Cines Co. v. American Film Mfg. Co., 190 Ill. App. 124.

NEWMAN, POPPENHUSEN & STERN, for defendant in error; CHARLES T. FARSON, of counsel.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

The Photo Cines Company, a corporation with principal office in the city of New York, commenced an action of the fourth class in the Municipal Court of Chicago, to recover damages for the breach of an oral contract, against the American Film Manufacturing Company, an Illinois corporation with principal office in the city of Chicago, defendant. It was alleged in plaintiff's statement of claim, in substance, that under said contract plaintiff agreed to sell and ship to the defendant at Chicago, and the defendant agreed to accept from the plaintiff 68,012 feet of raw, positive, cinematograph film, at three and one-half cents per foot, said film to be paid for in cash upon the delivery thereof; that on or about February 16, 1911, plaintiff shipped said film to Chicago but defendant refused to accept and pay for the same; that by reason of such refusal plaintiff was obliged to sell said film "in the open market" at great loss, and also incurred expenses for express and freight charges, and plaintiff sustained damages in the sum of \$752.22. In defendant's affidavit of merits it was alleged, in substance, that defendant did not owe plaintiff any sum as damages; that plaintiff violated said oral contract in that the film offered to be delivered to defendant was defective in quality and not according to the terms of said contract as to quality, and was unmerchantable and wholly unfit for use in defendant's business; that because of this defendant refused to accept said film; and that portions of the film, sold under said contract and previously accepted by defendant, were so defective in quality that the use thereof resulted in great damage and loss to defendant and brought it into bad repute with its customers, etc. The case was tried before the

court without a jury, resulting in the court finding the issues against the defendant and assessing plaintiff's damages at the sum of \$752.22, and entering judgment upon the finding.

The defendant seeks by this writ to reverse the judgment, chiefly upon the ground that the finding and judgment are against the weight of the evidence. The plaintiff contends that inasmuch as it does not appear from the stenographic report of the proceedings at the trial that defendant excepted to the judgment, the question of the sufficiency of the evidence to support the judgment cannot now be inquired into by this court.

The stenographic report appears to have been submitted to the trial judge for certification by him and to have been filed with the clerk of the court in apt time. It purports on its face to be a "stenographic report of the testimony taken and proceedings had on the trial," and to contain all the evidence, and it seemingly contains the rulings of the court upon all the questions submitted and ruled upon by the judge of the court. The trial judge certifies over his official signature that the same "is a full, true and complete transcript of all the evidence taken and offered at the trial of the foregoing case and the rulings of the court with respect to such evidence, and a correct stenographic report of the proceedings at the trial of said case, and a correct statement of such other proceedings in said case as said party desires to have reviewed." It also appears that after the court had announced his finding the defendant moved to set the same aside and for a new trial, which motion was overruled and defendant excepted, and thereupon the court entered judgment in the following words: "Enter judgment in favor of the plaintiff and against the defendant in the sum of \$752.22," and thereupon defendant, by its counsel, prayed an appeal to this court, which was allowed upon filing bond, etc. But the re-

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port does not disclose that the defendant excepted to the entry of the judgment, and it does not appear that any propositions of law were submitted.

Prior to the amendment, hereinafter mentioned, to section 81 of the Practice Act of 1907, (J. & A. ¶ 8618), it was the law that in the absence of an exception to the judgment, in a case tried before the court without a jury, the sufficiency of the evidence to support the judgment could not be inquired into upon an appeal. *Climax Tax Co. v. American Tag Co.*, 234 Ill. 179, 182. And it was also the law that in a case so tried a motion for a new trial was neither required nor authorized by law or the rules of practice, and could serve no purpose whatever in preserving questions for review. *Climax Tag Co. v. American Tag Co.*, *supra*; *Mahony v. Davis*, 44 Ill. 288, 291; *Sands v. Kagey*, 150 Ill. 109, 114; *Union Ins. Co. v. Crosby*, 172 Ill. 335, 336. In the *Crosby* case the action was in assumpsit and a trial was had before the court without a jury and judgment was rendered for the defendant. No propositions of law were submitted to the trial judge and no exception was taken to the judgment. A motion for a new trial, however, was made, and it was argued that such motion was, of itself, a sufficient exception to the judgment, but the court held to the contrary. In the *Climax Tag Co.* case the action was also in assumpsit and a trial was had without a jury and the finding and judgment were in favor of the plaintiff. The bill of exceptions disclosed that when, at the conclusion of the trial, the court announced its decision finding the issues for plaintiff and assessing its damages at a certain sum, counsel for defendant said: "I think you are wrong," and stated he desired to enter a motion for a new trial, and that thereupon the court announced: "Motion for new trial overruled and exception, appeal prayed to Appellate Court and granted; you can have thirty days for a bond"; but the bill of exceptions did not disclose that a formal exception

was taken to the judgment itself. It was contended in the Supreme Court that said statement of defendant's counsel, made when the court announced its decision, was a protest against the court's finding and judgment, and was to all intents and purposes an exception, but the court held otherwise. It was further contended that said statement of defendant's counsel, followed by a motion for a new trial, which motion was overruled, exception taken to the order overruling the motion and an appeal prayed and allowed, showed an intention to have the court's rulings reviewed, and that what he said as to the rendition of the judgment, in the light of the subsequent steps taken, should be held to be an exception to said judgment, but the court held to the contrary. In the light of the decisions of our Supreme Court we are of the opinion that in the present case, the stenographic report not affirmatively showing that defendant formally excepted to the judgment of the trial court, the question whether the judgment is against the weight of the evidence cannot be considered by us, *unless* we are authorized to do so under and by virtue of the amendment, hereinafter mentioned, to section 81 of the Practice Act of 1907.

And we do not think that we are authorized to review the evidence in the absence of a formal exception to the judgment, because of the provisions contained in subdivision 8 of section 23 of the Municipal Court Act of 1905, as amended in 1907 (J. & A. ¶ 3335), which section has reference to the prosecution of writs of error in cases of the fourth and fifth classes. Said subdivision provides in part as follows:

“Nor shall *any exceptions* to the rulings and decisions of the Municipal Court upon the trial, which appear to have been made against the objection of the party complaining thereof, be necessary to the right of either party to a review of such rulings and decisions in the Supreme Court or Appellate Court upon their merits, but it shall be the duty of the Supreme Court or the Appellate Court, as the case may be, to decide

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such case upon its merits as they may appear from such statement or stenographic report or reports signed by the judge.”

Section 38 of said Municipal Court Act as amended (J. & A. ¶ 3350), provides in part as follows:

“That whenever it appears in any bill of exceptions signed in any case of the first class or any case of the second class or any case of the third class or any bastardy case, * * * that any erroneous ruling was made by said Municipal Court, against the objection of the party complaining thereof, but that *no formal exception* was taken by such party thereto, such erroneous ruling shall be subject to review upon appeal or writ of error to the same extent and in like manner *as if it appeared that a formal exception had been taken thereto* by the party complaining.”

In *Blake v. DeJonghe Hotel & Restaurant Co.*, 263 Ill. 471, which was a case of the first class in the Municipal Court tried without a jury, it is said (p. 473, italics ours):

“Although in this case there was a waiver of a jury, nevertheless the Appellate Court had no authority to determine the question of fact or to review the evidence because there was no exception to the judgment of the trial court. * * * The defendant in error relies upon section 38 of the Municipal Court Act, * * *. Section 29 of article 6 of the constitution requires all laws relating to courts to be of uniform operation, and this requires that they shall operate uniformly in all similar cases in the particular court. The provision of the Municipal Court Act just mentioned is in conflict with this provision of the constitution and is therefore void. In all cases coming from any court but the Municipal Court, the Appellate Court or this court could review the judgment of the trial court as to the evidence only in case an exception was taken to the judgment and made a part of the record by a bill of exceptions. Section 38 would destroy uniformity of procedure and practice of this court and the Appellate Court in cases coming from the Municipal Court, and the provision is in conflict with the constitution. * * * *The amendment to section 81*

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of the Practice act did not go into effect until July 1, 1911, eight months after the trial in the Municipal Court, and did not affect this case."

It will be noticed that the provisions of said section 23 and of said section 38 of the Municipal Court Act as regards exceptions are quite similar. If, for the reasons stated in the *Blake* case, *supra*; this Appellate Court has no authority to review the evidence in a *first class* case, tried in the Municipal Court without a jury, because no exception was taken to the judgment, we think it is plain that for the same reasons this court has no authority to review the evidence in a *fourth class* case, tried in said Municipal Court without a jury prior to July 1, 1911, it not appearing that an exception was taken to the judgment. *Lassers v. North-German Lloyd Steamship Co.*, 244 Ill. 570, 573. The present case is one of the *fourth class*, tried in the Municipal Court without a jury in October, 1913, the judgment being entered on October 16th, more than two years after said amendment to section 81 of the Practice Act of 1907 went into effect.

What is that amendment? And by virtue of it are we authorized to review the evidence in the present case, notwithstanding it does not appear that any formal exception was taken to the entry of the judgment?

Section 59 of the Practice Act of 1872 provided as follows:

"If, during the progress of any trial in any civil cause, either party shall allege an exception to the opinion of the court, and reduce the same to writing, it shall be the duty of the judge to allow said exception, and sign and seal the same, and the said exception shall thereupon become a part of the record of such cause."

The above provision became the first clause of section 81 of the Practice Act of 1907, with the words "and seal" omitted, and with the words "or criminal" added between the words "civil" and "cause," and

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other clauses were added, and became a part of section 81, as to the sufficient authentication of a bill of exceptions or certificate of evidence, etc.

By the amendment made to section 81 in 1911, the said first clause of the section remained in the section, and immediately preceding said clause the following new clause appeared as the first clause of the section:

“If, during the progress of any trial in any civil or criminal cause, either party shall submit to the court any matter for a ruling thereon and the court shall rule adversely to the party submitting the same, such ruling shall be deemed a matter for review in any court to which the same cause may be thereafter taken upon appeal or by writ of error *without formal exception thereto*, and after judgment, at any time during the term of the court at which judgment was entered or within such time thereafter as shall, during such term, be fixed by the court, any party desiring to prosecute a writ of error to or appeal from any such judgment, may submit to the court a *stenographic report of the trial* containing the evidence and the rulings of the court upon all or any of the questions submitted to and ruled upon by the judge thereof, and he shall examine the same, and, if correct, officially certify to the correctness of such report, and the same shall thereupon be filed in said court and become a part of the record in said cause, and all matters and things contained in such stenographic report shall become as effectually a part of said record as if duly certified in a formal bill or bills of exceptions, or * * * .”

In said section 81, as amended in 1911, again was contained the clauses as to the sufficient authentication of a bill of exceptions or certificate of evidence, save that wherever the words “bill of exceptions or certificate of evidence” appeared, these words were changed to read “bill of exceptions, certificate of evidence or *report of trial*”; and other new clauses were added relative to the filing of a *præcipe* for a record, etc.

Sections 60 and 61 of the Practice Act of 1872 provided as follows:

“60. Exceptions taken to decisions of the court, upon the trial of causes in which the parties agree that both matters of law and fact may be tried by the court, and in appeal cases, tried by the court without the intervention of a jury, shall be deemed and held to have been properly taken and allowed, and the party excepting may assign for error, before the Supreme Court, any decision so excepted to, whether such exception relates to receiving improper or rejecting proper testimony, or to the final judgment of the court upon the law and evidence.”

“61. Exceptions taken to decisions of the court, overruling motions in arrest of judgment, motions for new trials, motions to amend and for continuances of causes, shall be allowed, and the party excepting may assign for error any decision so excepted to.”

These two sections became sections 82 and 83, respectively, of the Practice Act of 1907 (J. & A. ¶¶ 8619, 8620), save that in section 82 the words “before the Supreme Court,” contained in section 60, were omitted. It may be of assistance to a better understanding of the meaning of the three sections, section 81 as amended, and sections 82 and 83, as construed together, to here relate a portion of their history.

Anciently, no error could be assigned, except for an error of law, apparent upon the face of the record itself. *Baxter v. People*, 8 Ill. (3 Gilm.) 368, 373. Hence, where a party alleged anything *ore tenus* which was overruled by the judge, this could not be assigned for error. *Yarber v. Chicago & A. Ry. Co.*, 235 Ill. 589, 598; *Wheeler v. Winn*, 53 Pa. St. 122, 126. “There was no bill of exceptions, and, therefore, no ruling on the admission or rejection of evidence, error in the charge of the court, or objection of any kind arising on the trial, could be alleged for error because it did not appear on the record, and so the party aggrieved had no remedy.” *Yarber case, supra*. To

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remedy this hardship the Statute of Westminster 2 (13 Edw. 1, ch. 31) was passed, "which directed the justices to allow and put their seals to an exception when he that alleges the exception writes the same and requires them to do so. The statute did not appoint the time when the exception should be allowed and sealed, but the practice was, as the nature of the thing required, that the substance of the exception should be reduced to writing when taken, though it need not then be drawn up in form. (2 Tidd's Pr. 863.) By the statute of February 4, 1819 (which is now chapter 28 of the Revised Statutes), this statute became a part of the law of Illinois." *Haines v. Knowlton Danderine Co.*, 248 Ill. 259, 261. By virtue of said statute of Westminster 2, "the bill of exceptions was upon a matter of *law* arising on the trial and *not* upon any question of *fact*, and judgment was required to be given on the writ of error according to the exception as it ought to be allowed or disallowed. But no question of *fact* could be drawn into examination *again* by a bill of exceptions. * * * The motion for a new trial was not only unnecessary, it was practically unknown. * * * It was not until the middle of the seventeenth century that the practice of granting new trials upon motion began to prevail, * * *. The object of the motion for a new trial was *not* to review any error of *law* committed by the court, but was to review the question of *fact* as found by the jury. The granting or denial of the motion was entirely *discretionary* with the court. No exception could be taken to the decision thereon, nor could it be assigned for error." *Yarber case, supra*.

In 1827 the General Assembly of this state passed an act entitled "An Act concerning Practice in Courts of Law," in force June 1, 1827 (Revised Laws, 1827). Section 19 of the act provided:

"If during the progress of any trial in any civil cause, either party shall allege an exception to the opinion of the court, and reduce the same to writing,

it shall be the duty of the judge to allow the said exception, and sign and seal the same; and the said exception shall thereupon become a part of the record of such cause.”

Our Supreme Court has held that this section was “substantially the same as the Statute of Westminster 2” and “introduced no change.” *Haines* case, *supra*. The section became section 21 of the Practice Act of 1845 (R. S. 1845), and later section 59 of the Practice Act of 1872, and still later, with the slight changes above mentioned, the first clause of section 81 of the Practice Act of 1907, and still later, with said slight changes, the second clause of section 81, as amended in 1911. Both before and after the passage of said Practice Act of 1827, and until the passage of the act of July 21, 1837, hereinafter mentioned, our Supreme Court in several cases held that the granting or refusing a new trial was a question to be determined in the sound *discretion* of the trial court, and that no exception could be taken or error assigned on the trial court’s refusal. *Clemson v. Kruper*, Beecher’s Breese 210; *Street v. Blue*, *id.* 261; *Adams v. Smith*, *id.* 283; *Vernon, Blake & Co. v. May*, *id.* 294; *Harrison v. Clark*, 2 Ill. (1 Scam.) 131. In *Clemson v. Kruper*, *supra* (decided before section 19 of the Act of 1827 was passed), a verdict was returned for the plaintiff, Kruper, in an action of assumpsit. The defendant’s motion for a new trial was overruled, “and a bill of exceptions, containing the evidence given on the trial, was taken to the opinion of the court overruling the motion for the new trial.” Judgment was rendered on the verdict, and defendant assigned as error in the Supreme Court the overruling of his motion for a new trial. It was urged by defendant in error (plaintiff) that the refusal to grant a new trial could not be assigned for error, and the court so held and affirmed the judgment, saying (p. 211): “This objection, the court think, well taken, both on the score of adjudged cases, and on principle. A bill of excep-

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tions cannot be taken, unless the exception be made *on the trial, and before the jury is discharged*, and it lies for receiving improper or rejecting proper testimony, or misdirecting a jury on a point of law. The bill of exceptions taken in this case was not for any decision that occurred *during the progress of the trial*, and was therefore improperly allowed.” The other cases, last above cited, were all decided after said act of 1827 was passed, and were to the effect, following *Clemson v. Kruper, supra*, that a refusal to grant a new trial could not be assigned as error. After the passage of said act of 1827 and until the passage of said act of July 21, 1837, hereinafter mentioned, our Supreme Court in several cases also held that a bill of exceptions would not lie to the final judgment of the trial court, where the case was tried by the court without a jury. *Swafford v. Dovenor*, 2 Ill. (1 Scam.) 165; *White v. Wiseman*, id. 169; *Gilmore v. Ballard*, id. 252; *Ballingall v. Spraggins*, 2 Ill. 330. In the *Gilmore v. Ballard* case, the court followed the holding in *Clemson v. Kruper, supra*, to the effect that a bill of exceptions cannot be taken unless the exception be made *on the trial*, and that it lies only for receiving improper or rejecting proper testimony, or deciding incorrectly a point of law, and said (p. 253): “In the present case, the bill of exceptions was taken to the judgment of the court upon the *facts* given in evidence by the parties. The course to be pursued in a case tried by the court without a jury is clearly pointed out in the case of *Swafford v. Dovenor*, * * * . Whenever the defendant supposes that the plaintiff has failed to support his action, he should move the court to nonsuit the plaintiff, or demur to the testimony. If he does neither, and goes on and gives evidence, the office of the judge is then completely merged into that of a juror. He has only to decide upon the *weight* of testimony; and his decision, if wrong, can only be reviewed in the same manner as the wrong

verdict of a jury, to wit, by *application for a new trial*, and consequently a bill of exceptions cannot be taken.”

It doubtless sometimes happened, in cases tried with or without a jury, that the trial court in refusing a new trial abused the discretion vested in it, yet the defeated litigant could not assign as error such refusal in an Appellate Court. To remedy this hardship the General Assembly passed an Act, in force July 21, 1837, entitled: “An Act to amend the Act entitled ‘An Act concerning Practice in Courts of Law,’ approved 29th January, 1827.” Laws of 1837, special session, p. 109. This amendment consisted of two sections, the first applying to cases tried by the court without a jury and the second to other cases, and is as follows:

“Sec. 1. * * * Exceptions taken to opinions and decisions of the circuit courts, upon the trial of causes, in which the parties agree that both matters of law and fact may be tried by the court; and in appeal cases, tried by the court without the intervention of a jury, shall be deemed and held to have been properly taken and allowed, and the party excepting may assign for error before the Supreme Court, any decision or opinion so excepted to, whether such exception relates to receiving improper, or rejecting proper testimony, or to the final judgment of the court upon the law and evidence.”

“Sec. 2. Exceptions taken to opinions or decisions of the circuit courts, overruling actions in arrest of judgment, motions for new trials, and for continuances of causes, shall hereafter be allowed; and the party excepting may assign for error any opinion so excepted to, any usage to the contrary notwithstanding.”

These two sections became sections 22 and 23, respectively, of the Practice Act of 1845, save that section 23 of the Act of 1845 did not have the words, “any usage to the contrary notwithstanding.” And said two sections, with other slight changes, later became sections 60 and 61, respectively, of the Practice Act of 1872, and still later became sections 82 and 83, respec-

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tively, as slightly changed, of the Practice Act of 1907.

In civil cases tried before a jury, after the passage of said Act of July 21, 1837, authorizing exceptions to be taken to the overruling of a motion for a new trial, our Supreme Court held that an appeal would lie from the decision of the trial court refusing such motion. *Smith v. Shultz*, 2 Ill. (1 Scam.) 490; *Yarber v. Chicago & A. Ry. Co.*, 239 Ill. 589, 600. It was also held that, such right of exception being entirely statutory, and being allowed only to the *overruling* of motions for new trials, the refusal to *grant* a new trial was not reviewable (*Brookbank v. Smith*, 3 Ill. (2 Scam.) 78); and such is still the law. (*Yarber* case, *supra*.) It was also held that, in civil cases so tried, the overruling of a motion for a new trial, although the evidence was wholly insufficient to warrant the jury's verdict, could not be reviewed, in the absence of an exception taken to the decision of the court in overruling said motion. *Pottle v. McWorter*, 13 Ill. 454, 456. And, as late as October, 1908, it was decided in the *Yarber* case, *supra*, (p. 597) that: "In order to bring the question of the *sufficiency of the evidence to sustain the verdict* before this court for review it is necessary for the losing party to make a motion for a new trial, and, upon its being overruled, to except to such ruling, and to include such motion, the order overruling the same, and his exception thereto, together with the evidence, in the bill of exceptions."

In civil cases tried before the court without a jury, after the passage of said Act of July 21, 1837, authorizing the taking of an exception "to the final judgment of the court upon the law and evidence" and assigning error thereon, our Supreme Court held that error could be assigned on such decision provided it appeared in the bill of exceptions that an exception was taken at the time to such decision (*Parsons v. Evans*, 17 Ill. 238; *Metcalf v. Fouts*, 27 Ill. 110, 114; *David M. Force Mfg. Co. v. Horton*, 74 Ill. 310, 311); and that in case

it appeared that such exception was so taken, it was not necessary, in order to have the evidence reviewed, that it further appear either that a motion for a new trial was made, or if made and overruled that an exception was taken to the overruling of the motion. *Mahony v. Davis*, 44 Ill. 288, 292; *Jones v. Buffum*, 50 Ill. 277, 279.) As said in *Mahony v. Davis*, *supra*, where it was contended that the court could not review the evidence because there had not been made a motion for a new trial: "There is an early decision of the court to that effect, but the late practice of the court has been to confine that decision to cases where the trial was by a jury. In the present instance it was by the court, and, the judge having once passed upon the evidence, it was not necessary to go through the form of submitting it to him again by moving for a new trial."

It will be noticed that the provisions, strictly construed, of section 19 (relating to exceptions) of the Act of 1827, required that the exceptions to the opinion of the court should be alleged and reduced to writing by the party, and allowed, signed and sealed by the judge, all, *during the progress of the trial*. Before the passage of the act of July 21, 1837, our Supreme Court held, as above shown, that in civil cases tried before a jury the exception must be taken "on the trial and before the jury is discharged" (*Clemson v. Kruper*, *supra*), and that in cases tried without a jury the exception must be taken "on the trial." (*Swafford v. Dovenor*, *supra*; *Gilmore v. Ballard*, *supra*.) When the act of July 21, 1837, was passed, authorizing the allowance of an exception taken to the decision of the trial court in overruling a motion for a new trial in a jury case, and further authorizing the allowance of an exception taken to the *final judgment* of the court in a case tried without a jury, section 19 of the act of 1827 still remained in the statutes, and the provisions of both acts, except as slightly changed as above shown,

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continued to remain in the statutes, and are now contained in the Practice Act of 1907, as amended. We think it appears that since July 21, 1837, these provisions have been construed together by our Supreme Court, and that they should now be construed together. It is manifest that the decision of the trial court in a case tried before a jury, overruling a motion for a new trial, is subsequent to the rendition of the verdict; and it is equally manifest that the decision of the court in a case tried without a jury, rendering a final judgment on the law and evidence, is the conclusion of the trial. An exception *taken* to the judgment cannot be *alleged* before the judgment is pronounced.

The word "trial" is defined in 2 Burrill's Law Dictionary (2nd Ed.) page 545, as follows: "In a general sense. The formal investigation and decision of a matter in issue between parties, before a competent tribunal. * * * In a stricter sense,—the examination before a competent tribunal, according to the laws of the land, of the *facts* put in issue in a cause, for the purpose of determining such issue." In *Clennon v. Britton*, 155 Ill. 232, 243, our Supreme Court said that the words "trial" and "hearing" are "familiar terms, and are generally understood as meaning a judicial examination of the issues between the parties, whether of law or of fact." In 21 Encyc. Pl. & Pr., 957, it is said: "The trial may be considered as incomplete until all the issues of law as well as of fact have been determined and until final judgment has been entered." In *Jenks v. State*, 39 Ind. 1, it appeared that it was provided in a certain section of the statutes of the State of Indiana that all bills of exception in a criminal case must be made out and presented to the judge "at the time of the trial," or within such time thereafter during the term as the court might allow, signed by the judge and filed by the clerk; that the bill of exceptions was not signed or filed at the term at which the cause was submitted to the jury, but was signed and filed at

the second term thereafter, that being the term at which the motion for a new trial was determined and judgment rendered; and that it was contended in the Supreme Court that said bill of exceptions was not properly in the record. The Court, in denying the contention, said (p. 10): "Until the motion for the new trial was disposed of, the cause was pending in court. * * * The proceedings were *in fieri* until judgment was rendered. We are of the opinion that the word trial, as used in the above section, was not used in its limited and restricted sense, but in a general sense, and includes all the steps taken in the cause from the submission of the cause to the jury to the rendition of judgment. * * * We think the section under examination should receive a liberal and beneficial construction, and not a strict, technical, and restricted one." In *Hake v. Strubel*, 121 Ill. 321, 326, our Supreme Court said: "By an unbroken line of decisions it has been held by this court, that the exception must be taken at the time the alleged erroneous ruling or decision was made; and, also, that the bill of exceptions should show upon its face that the exception was taken at the time, and the bill signed, sealed and filed during the term. But to meet the varying exigencies, and for the convenience of bench and bar, the practice early obtained of allowing time in which to present the bill of exceptions, by an order entered of record in the cause, or by a written stipulation of parties filed in the case; and the time thus allowed often extended beyond the term, and the correctness of this practice has been repeatedly sanctioned by this court. See *Evans v. Fisher*, 5 Gilm. 453; *Burst v. Wayne*, 13 Ill. 664; *Brownfield v. Brownfield*, 58 id. 152; *Goodrich v. Cook*, 81 id. 41." In *Haines v. Knowlton Danderine Co.*, 248 Ill. 259, 261, it is said: "This practice was not founded upon the statute but grew out of the action of the courts." In *Burst v. Wayne*, *supra*, the court, after quoting section 21 of the Practice Act of 1845 (which is the same as section

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19 of the Act of 1827), said: "Strictly speaking a party under this statute would be required to reduce his exception to writing, and have it signed *during the progress of the trial*; but a strict compliance with the letter of the statute would, in many cases, be impracticable, and has never been required." It is thus seen that our Supreme Court, at least since the Act of July 21, 1837, has not strictly construed the provisions of section 19 of the Act of 1827 (which are now in substance contained in section 81 of the Practice Act of 1907, as amended in 1911).

In the case of *Miller v. Anderson*, 189 Ill. App. 72, recently decided by the "D" branch of this court, Miller and others, appellees, recovered a judgment in the Municipal Court, on a trial had before the court without a jury in a suit of the first class, against Anderson. The latter claimed that the evidence was insufficient to sustain the judgment, while appellees insisted that the evidence could not be reviewed because no exception was taken to the judgment. The transcript of the record contained a bill of exceptions, and the bill did not disclose any exception taken to the judgment. The court held that the document, in its particular form, could not be treated and considered as a sufficient stenographic report of the trial under the provisions of the first clause of section 81 of the Practice Act of 1907, as amended in 1911, and, therefore, refused to review the evidence, in the absence of an exception to the judgment. In the course of the opinion, delivered by Mr. Presiding Justice Fitch, the court gave its construction of the new first clause of said amended section as coupled, by the word "or," with the second clause of said amended section (which second clause was the first clause of the section before the same was amended) and said, in substance, that by passing the section as amended, the legislature did not thereby abolish bills of exceptions but merely made provision for an *alternative* method of presenting questions for review, in the form of a stenographic

report of the trial; that, by virtue of the first clause of said amended section, any party, desiring to prosecute a writ of error to or appeal from any judgment, has the privilege, after judgment and within the time as properly fixed by the court, of submitting to the court, "a stenographic report of the trial, containing the evidence and the rulings of the court upon all or any of the questions submitted to and ruled upon by the judge thereof"; that if such a stenographic report is so submitted the judge is required to examine the same, and if found correct to "officially certify" to its correctness; that the same shall thereupon be filed in said court and become a part of the record in the cause, and all matters and things contained in such report shall become as effectually a part of said record as if duly certified in a formal bill or bills of exceptions; and that if it appears from such report that any matter was submitted to the trial court for a ruling, and that the court ruled "adversely to the party submitting the same," then such ruling is saved for review in any court to which the cause may be taken upon appeal or by writ of error, whether any formal exception to such ruling be noted or not. We concur in this construction.

In the case of *Meek v. Chicago Rys. Co.*, 183 Ill. App. 256, 261, which was a case decided by the "C" branch of this court on appeal from the Circuit Court, it was said in the opinion written by Mr. Presiding Justice Graves:

"A consideration of section 81, as amended and as it existed prior thereto, discloses no reason, and none has been suggested for holding that by the amendment it was intended to substitute a stenographic report for a bill of exceptions, but does disclose a manifest intention to provide two co-ordinate methods of preserving for review rulings on questions arising in common law courts. The first by means of a stenographic report of the trial and the second by means of a bill of exceptions, as theretofore. * * *. The part of this amended section providing for bills of exceptions is

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the original provision without change. * * * When the legislature re-enacted that part of original section 81 relating to bills of exceptions, it must be presumed they did so in the light of the judicial construction that had been given to it, and of the rights of litigants existing under it and regardless of it, as declared by the courts, as well as in the light of section 2 of chapter 131'' of our Revised Statutes.

The present case was tried in the Municipal Court without a jury, resulting in the trial court making a finding in favor of the plaintiff and entering a judgment on the finding against the defendant, and the latter seeks by writ of error to reverse that judgment, chiefly because the finding and judgment are against the weight of the evidence. There is contained in the transcript of the record, not a bill of exceptions, but a stenographic report of the trial, which report is certified to by the trial judge, and which, as it seems to us, fully complies with all the requirements of the first clause of said amended section 81 of the Practice Act of 1907, as to such report. It appears from the report that the chief matter or issue submitted to the trial court by both plaintiff and defendant for a ruling or decision was whether the plaintiff, under all the evidence, was entitled to a finding and judgment in its favor. The defendant claimed all through the trial that it was not indebted to the plaintiff in any amount, but the court, in entering the finding and judgment, ruled adversely to the defendant. It further appears from the report that when the court delivered the finding the defendant moved to set it aside and for a new trial, which motion was denied, but it does not appear that when the court pronounced the judgment the defendant took a formal exception thereto. The fact that, when the court delivered the finding, the defendant moved to set it aside and for a new trial, shows that defendant *objected* to the action of the court and that the judgment, which was thereupon immediately pronounced, was not entered by consent.

The first words of said first clause of said section 81, as amended, are: "If, *during the progress of any trial* in any civil or criminal cause, either party shall submit to the court *any* matter for a ruling thereon and the court shall rule adversely to the party submitting the same, such ruling shall be deemed a matter for review in any court to which the same cause may be thereafter taken upon appeal or by writ of error without *formal exception thereto*," etc. To hold that by the use of these words, in a case tried before the court without a jury, the legislature intended that the adverse ruling of the court on a matter submitted should be confined to a ruling made before the court had pronounced the finding, and should not include the decision or judgment, would, as it seems to us, be a highly technical and unwarranted construction, especially in view of the provisions of section 82, the history of sections 81 and 82, the construction put upon them by our courts, the meaning of the word "trial," and the evident intention of the legislature to provide a method for the review of causes without the necessity of the record disclosing that a formal exception was taken at the time to the adverse ruling upon which error is assigned.

The record in the present case contains a stenographic report and not a bill of exceptions. We are therefore under no necessity of discussing the question whether, if the record contained a bill of exceptions and the bill did not disclose a *formal* exception taken to the judgment, it was the intention of the legislature, in passing said amended section 81, to authorize us to review the evidence, notwithstanding the absence of such formal exception.

Our conclusion is that in the present case we may review the evidence contained in the stenographic report, notwithstanding that it does not appear in said report that defendant took a formal exception to the judgment

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Counsel for defendant here contend (1) that the finding and judgment are against the weight of the evidence, in that it appears that all film purchased from plaintiff was purchased under plaintiff's express warranty that the film was first-class film and of good quality, and under an implied warranty that it was merchantable and fit for the purpose for which defendant desired it, that the lot of film in question was of the same kind and quality as other lots of film previously shipped by plaintiff, that the film previously shipped was not as warranted, and that upon the discovery by defendant of that fact defendant was justified in canceling the order for the lot of film in question and refusing to accept the same; (2) that plaintiff did not sufficiently prove the damages claimed by it and assessed by the court; and (3) did not sufficiently prove that the resale by plaintiff of the lot of film refused by defendant was made to the best advantage of defendant.

The material facts of the present case, as disclosed from the evidence, are substantially as follows: In November, 1910, Samuel Hutchinson, president of defendant company, called on Maurice Gennert, secretary and treasurer of plaintiff company, at that company's office in New York City. Hutchinson told Gennert that defendant desired to purchase some raw, positive, cinematograph film for use in defendant's business of manufacturing motion picture films for entertainment purposes. Gennert replied that plaintiff had for sale such film which was manufactured in England, that the price thereof was three and one-half cents per foot, cash on delivery, that it was first-class film, of good quality and fit for the purpose for which defendant desired it. Hutchinson, relying upon Gennert's statements, ordered a two weeks' supply of the film, and Gennert verbally agreed on plaintiff's behalf to ship said film to defendant, and the same was shipped and received by defendant and paid for. Several subsequent deliveries were made to defendant

during the months of December, 1910, and January, 1911, and the film was paid for. It appears that raw, positive, cinematograph film consists of long, thin strips of celluloid, coated with an emulsion containing photographic properties, on which can be printed pictures from a negative film. After the pictures are printed on the positive film the same is further developed by photographic processes and put up in long lengths of about 1,000 feet on reels. Then the film is ready to be passed through a projecting machine by an exhibitor of motion pictures. The factory processes of printing and developing the film require several weeks' time. The standard length in January and February, 1911, of a first-class positive film was from 180 to 200 feet, and to make said 1,000 feet lengths several of the films had to be joined together. When the reels are completed they first go to a distributing and sales company, thence to a small exchange and finally to the theater or other user. Weaknesses and defects in the celluloid base cannot generally be noticed until the film has been in use for several weeks in the machine of the exhibitor. Ordinarily the reels should last six months to a year without repairs. During the last week in January, 1911, Hutchinson, while in New York, verbally ordered of plaintiff, through Gennert, two lots of 65,000 feet each, of raw film, to be shipped to defendant in February, and the first lot of approximately 65,000 feet was so shipped on February 8, 1911, cash on delivery, at said price of three and one-half cents per foot, plus express charges from New York to Chicago, and the same was subsequently received by defendant and paid for. According to the testimony of Hutchinson, he again saw Gennert in New York about February 5th and informed him that complaints had recently been received from customers of defendant as to the film which had previously been shipped by plaintiff to defendant, that the film was not of good quality and not as represented, that it would not wear or "hold up" the usual length of time, and

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directed plaintiff not to ship any more of the film; that thereupon Gennert said that the first of said two lots had already been shipped and that defendant would have to take that lot; that Hutchinson agreed that defendant should take and pay for said first lot but told Gennert that defendant would not receive any more, and that this was the last conversation he had with Gennert. According to Gennert's testimony, this conversation was had at a later date, about February 15th, and Hutchinson agreed to accept both of the two lots of film when delivered. Gennert, however, admitted that he had a conversation with Hutchinson in New York about February 5th, at which time Hutchinson said that defendant was "having trouble with the film," but did not request plaintiff to pay back any money on account of any of the film previously delivered. The evidence also shows that plaintiff shipped by express, C. O. D., to defendant at Chicago, on February 16, 1911, said second lot of film, containing 68,012 feet, but that defendant refused to accept and pay for the same, and subsequently the film was returned by the express company to plaintiff at New York. Gennert admitted that the kind and quality of the film in the last shipment was precisely the same as in the previous shipments. The evidence also shows that after the lot of film in question was returned to plaintiff in New York, plaintiff sold "about" 9,500 feet thereof at three and one-half cents per foot, and subsequently returned the balance of said film to the original manufacturer in England and was paid for the same at the rate of two and one-fourth cents per foot. The damages claimed were based upon the difference in price, between three and one-half and two and one-fourth cents per foot, on said balance so returned to England, and for certain cash expended for express charges and for freight charges to England.

We think that it was shown by a preponderance of the evidence that all raw film purchased by defendant was purchased under plaintiff's express warranty, that

the same was first-class film and of good quality, and also under an implied warranty that it was merchantable and fit for the purpose for which defendant desired to use it, which purpose was known to plaintiff; that the defects in the raw film which was shipped to and accepted by defendant were of such a nature that they would not become noticeable until after the same had been prepared for use by exhibitors of motion pictures and had been in use by said exhibitors for a considerable time; that as soon as defendant received notice of said defects it notified plaintiff not to ship the lot of film in question, but that plaintiff nevertheless shipped the same, which defendant refused to accept; that the film of said lot in question was of the same kind and quality as that of the other lots previously shipped by plaintiff, and that the film of said other lots was not first-class film or of good quality, as warranted by plaintiff, and was not fitted for defendant's purpose, in that it was of uneven width, too brittle, and lacking in tensile strength. And in our opinion the trial court, under all the evidence, was not justified in making the finding or entering the judgment. *Doane v. Dunham*, 65 Ill. 512; *Underwood v. Wolf*, 131 Ill. 425. Furthermore, the evidence as to plaintiff's damages was not sufficiently definite as to warrant the finding of the court. And the evidence did not sufficiently disclose that plaintiff, in making the resale of the lot of film in question, did so to the best advantage of defendant. *Bagley v. Findlay*, 82 Ill. 524; *John A. Roebling's Sons' Co. v. Lock Stitch Fence Co.*, 130 Ill. 660, 669.

The judgment of the Municipal Court is reversed and the cause remanded.

Reversed and remanded.

BARNES, PRESIDING JUSTICE: I agree that the record leaves open for our consideration the question as to the sufficiency of the evidence, and that the judgment should be reversed and the cause remanded, but upon different reasoning.

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I think the amendment to section 81, made in 1911, was intended to accomplish two things: (1) To permit a party to assign error in a court of review upon any adverse ruling or decision of the trial court without the formality of taking an exception thereto; and (2) to provide two methods of preserving the proceedings for review. It was not designed to recognize two distinct methods of practice, one requiring and the other dispensing with the formal taking of exceptions, and accordingly to resort or not to a bill of exceptions, if they were taken, and necessarily to a stenographic report, if they were not.

Before such amendment was made, a formal exception was requisite for an assignment of error, not only to an adverse ruling of the court made during the progress of the trial (using the term "trial" in its strict sense), but to its decisions on matters referred to in sections 82 and 83, and exceptions to all such matters were saved in a bill of exceptions. The amendment manifestly contemplates that the same matters may now be as effectively preserved for review by a stenographic report. Otherwise, while the rulings during the progress of the trial may be preserved by a stenographic report without formal exceptions, nevertheless, as to decisions on matters taking place thereafter, covered by sections 82 and 83 of the Practice Act, it would still be necessary to take formal exceptions and preserve them by a bill of exceptions in order to bring the entire proceedings before a court of review.

If, on the other hand, the statute be construed to mean that the formality of exceptions is dispensed with only in case the proceedings are preserved by a stenographic report, and when so preserved no exceptions need be taken to the matters provided for in sections 82 and 83, but that a bill of exceptions cannot be resorted to in case no formal exceptions were taken, as held in *Miller v. Anderson, supra*, then we have the anomaly of two methods of practice,—one where it is

necessary to take formal exceptions to all adverse rulings or decisions of the court at and subsequent to the trial, and another where they may all be dispensed with.

I think the statute should be construed to obviate any such *reductio ad absurdum*, and being a remedial statute, it should be construed liberally to carry out its manifest purposes as above stated, especially as it can be done without necessary conflict with other parts of the section or act.

The office of an exception is to indicate that the party taking it does not acquiesce in or consent to adverse rulings or decisions of the court. Under the practice heretofore, it has been necessary to take and preserve it as a basis for an assignment of error. Said amendment, however, changes that practice and allows the party against whom the ruling or decision is made to assign error and have the matter reviewed without *formal* exception. Therefore, a failure to except is no longer deemed consent to the ruling. Nevertheless, the assignment of error is still predicated upon the theory of nonconsent to adverse rulings whether an exception is actually taken or not; and it is immaterial for review whether the matter is brought before the court by a stenographic report showing no exception, or by a bill of exceptions alleging one which, under the amendment, is now preserved without the formality of taking it.

While the phraseology of section 81, as amended, is cumbersome and complicated, I think that this is the construction that will ultimately prevail.

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Emma Wadhams Green, Plaintiff in Error, v. Old People's Home of Chicago et al., Defendants in Error.

Gen. No. 19,794.

1. **FORFEITURES, § 1*—*how regarded.*** Forfeitures are never favored by courts of equity, and gifts for charitable purposes are the special care of such courts.

2. **WILLS, § 493*—*when bequest to charitable corporation forfeited.*** Where a bequest was made to an Old People's Home to promote the objects and purposes for which such Home was organized, such bequest would not be forfeited under the terms of the will unless it was clearly shown that the Home had ceased or failed to carry out effectively the objects and purposes for which it was organized.

3. **TRUSTS, § 243*—*what is remedy to enforce trust.*** In the event of nonuser or misuser of a gift for charitable uses, the remedy is not the forfeiture of the property to the grantor or his heirs, unless the trust is coupled with a condition to that effect, but by a proceeding in equity to enforce the trust.

4. **WILLS, § 493*—*when equity will not forfeit bequest at instance of heir.*** A court of equity will not, at the instance of an heir, decree a forfeiture of a bequest to an Old People's Home for the construction of a suitable building, where there is no showing as to the reasonableness or unreasonableness of the time elapsed, or the adequacy of the fund for the purpose contemplated.

5. **WILLS, § 495*—*how property disposed of when gift has lapsed or is void.*** Where lapsed or void gifts of personal property fall into a general residuary bequest, instead of being an intestate estate descending to the heirs at law, such heirs have no right or interest in a gift which lapses.

6. **WILLS, § 343*—*when conditional limitation valid.*** Under a will making devises to several charitable corporations, a conditional limitation is valid and effective and not obnoxious to the rule against perpetuities, since the beneficiary is a charitable corporation.

7. **WILLS, § 346*—*when conditional limitation created.*** Where a will provided for a bequest to a charitable corporation, but stated that if such corporation failed to carry out the purposes for which it was organized the bequest should be treated as a lapsed legacy, there being a residuary bequest to another charitable corporation

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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and a specific legatee, such will did not create a condition subsequent but a conditional limitation, the limitation over being in the nature of an executory devise.

8. WILLS, § 343*—*what is effect where limitation over is void.* Where a limitation over is void, the property is vested in the first taker as if the devise had been originally free from any limitation over.

Error to the Circuit Court of Cook county; the Hon. LOCKWOOD HONORE, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed December 22, 1914.

COBURN & BENTLEY, for plaintiff in error.

CHARLES R. WEBSTER, for defendants in error.

MR. JUSTICE SMITH delivered the opinion of the court.

This writ of error is prosecuted by the plaintiff in error to reverse a decree of the Circuit Court sustaining the demurrer of the Old People's Home of Chicago and its trustees to the bill of complaint and dismissing the bill for want of equity.

The plaintiff in error, complainant below, sought by her bill to have certain funds and securities, which, for the last twenty-five years, have been in the hands of the defendants, declared a trust fund in her favor, and an accounting, etc.

It appears from the bill that the complainant is the daughter and sole heir of Seth Wadhams, who departed this life February 6, 1888. The bill sets up that on June 29, 1886, Wadhams made his last will and testament, which was duly proved in open court and admitted to probate by the County Court of Du Page county, State of Illinois, where he lived at the time of his death, and a copy of the will is annexed to and made a part of the bill. Wadhams, at the time of his death, was possessed of an estate of about \$1,000,000,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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which included certain real estate occupied by him as a homestead known as "White Birch," in Du Page county, Illinois, and by the terms of his will he ordered and directed his executors to sell "White Birch" and dispose of the proceeds as follows: One-half part thereof to the Board of Trustees of the Old People's Home of Chicago, Illinois, to have and to hold the same to them and their successors in office, in trust, to manage, invest and control the same, and the same from time to time to use and reinvest, and the annual income thereof to use and expend in defraying the current expenses of a certain charitable home consisting of a building to be known as the "Home for Old Men," to be erected as provided in the will and particularly in the thirty-second paragraph thereof. In that paragraph the testator gave and bequeathed to the Board of Trustees of the Old People's Home of Chicago, Illinois, the sum of \$20,000, to have and to hold the same to them and their successors in office, in trust, however, to use and expend the same in the erection of a charitable building, the same to be used, managed and controlled by the said Board of Trustees as a "Home for Old Men of American Birth" only, separate and apart from said Old People's Home; and it is further provided in the thirty-fourth section of the will that in case the said Board of Trustees of the said Old People's Home, and the said Old People's Home, should at any time fail or cease to carry out effectively the objects and purposes for which they were organized, and to promote which the bequests were by the testator made and given, it was the will of said testator that the bequests made in the said will to the Old People's Home, and the terms thereof, should be held inoperative and void, and for that cause should become cancelled, revoked and annulled, and that the property, moneys and estate set aside to the said charitable use should be held and disposed of as a lapsed legacy, and should pass and become the property of the complainant.

It is alleged that the executors of the said testator, Wadhams, received one-half of the proceeds from the sale of the said homestead, the sum of \$10,000, the income of which was to be applied to and for the maintenance of said building to be erected and to be known as a "Home for Old Men of American Birth;" and on or about July 24, 1890, under the provisions of the will, the executors delivered to the then acting trustees of the said Old People's Home of Chicago the said sum of \$10,000 in trust, for the charitable uses and purposes expressed in the will.

It is further alleged in the bill that the executors, under and by virtue of the terms of the will, turned over and delivered to the said trustees of the Old People's Home of Chicago the sum of \$20,000, under and by virtue of the thirty-second paragraph of the will, for the purpose of erecting a building to be used as a Home for Old Men of American Birth, separate and apart from the other building of the Old People's Home, and that said moneys were received by the said trustees on or about June 23, 1890.

The bill further represents that the Old People's Home of Chicago and the trustees thereof and their successors have never used the said bequests, or either of them, to carry out effectively the objects and purposes for which the bequests were made, but, on the contrary, did immediately place the funds with some financial institution, trust company or bank, and caused them to be invested and reinvested during the twenty-two years last past in various securities, and have never built out of the fund of \$20,000 so bequeathed, the Home for Old Men of American Birth, separate and apart from the said Old People's Home, as provided in the will; nor have they used the proceeds of the said \$10,000 for the charitable use expressed in the will, but still retain the same, so that the fund in the hands of the bank or financial institution, exclusive of fees paid to said trust company or

financial institution, on May 18, 1911, amounted to the sum of \$71,900.

The bill further alleges that the Old People's Home of Chicago is a corporation organized under and by virtue of the laws of the State of Illinois, not for pecuniary profit, but for the charitable purpose of providing a home for old people.

The bill represents that the bequest has, by lapse of time in the failure to use the money for the purposes provided, and by reason of the statute against perpetuities, lapsed and become a trust fund for the complainant in the hands of the said Old People's Home of Chicago and its said trustees; that the complainant, as the sole heir of the testator, said Wadhams, on February 21, 1912, caused notice to be served upon the Old People's Home of Chicago and its officers and trustees to the effect that she is the sole heir of said Wadhams, deceased, and did thereby declare the bequest made by her father, the said Seth Wadhams, in his last will and testament, to have lapsed and to have become null and void, under and by virtue of the terms of his will, and that she demanded of the said Old People's Home of Chicago and its officers and trustees that they account to her for the said bequest, together with the interest earned thereon; yet they have failed and refused so to do, and deny that the bequest has lapsed.

The bill further represents that the Old People's Home of Chicago and the trustees thereof have secured from various sources, for the charitable purpose of providing a home for indigent old people, a large fund or sum of money exceeding \$1,000,000, and have used the same exclusively to construct extensive buildings for the support of indigent old ladies, but have built no building or buildings or provided any support for old men of American birth, either with such buildings already built, or separate and apart from the Old People's Home building established by them for old ladies, nor have they provided any support for old

men of American birth, as provided in the bill, nor have they used the bequests or legacies therein given them in accordance with the intent of the testator, whereby the complainant, as his heir, has the right to and has declared the said gift terminated, lapsed and cancelled.

The material clauses of the will of Seth Wadhams set out in the bill are the following:

“Third. I order and direct my executors to sell as soon after my death as they may deem expedient my homestead known as White Birch, and described as Blocks Three (3), Four (4), Nine (9), and Ten (10), in D. N. Burnham's Addition to Cottage Hill, in said Du Page county, and the proceeds to be distributed as follows, to-wit:

“One-half part thereof to the managers of the Chicago Nursery and Half Orphan Asylum, to have and to hold to them and their successors in office, in trust however, to and for the following uses and purposes namely, in trust, to hold, manage, invest and control the same, and the same from time to time to reinvest, and the annual income thereof to use and expend in defraying the current expenses of said Asylum, and the remaining one-half part of said proceeds to the board of trustees of the Old People's Home of Chicago, Illinois, to have and to hold the same to them and their successors in office, in trust, to manage, invest and control the same, and the same from time to time to reinvest, and the annual income thereof to use and expend in defraying the current expenses of The Home for Old Men, to be erected as hereinafter provided further, I hereby direct that my said homestead, known as White Birch, shall be sold to Mrs. Aurelia R. King of Chicago, Illinois, for the sum of \$20,000, if she desires to purchase the same. In case the said Mrs. Aurelia R. King shall decline to purchase said homestead, then the same may be sold to any child or children of the said Mrs. Aurelia R. King, for the said sum of \$20,000.”

The will then makes a large specific bequest to Frederick E. Hammond, known as Frederick E. Wadhams,

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and many bequests to various charities and individuals, and then follow the thirty-second, thirty-third and thirty-fourth paragraphs, to wit:

“Thirty-second. I give and bequeath to the Board of Trustees of the Old People's Home of Chicago, Illinois, the sum of \$20,000, to have and to hold the same to them and their successors in office, in trust, however, to use and expend the same in the erection of a suitable building, the same to be used, managed and controlled by the said Board of Trustees as a Home for Old Men, of American Birth only, separate and apart from said Old People's Home.

“The construction and design of said building to be under the charge and supervision of the said Board of Trustees, and to be erected upon a lot adjacent to said Old People's Home or any other lot now or to be owned by said trustees.

“Thirty-third. All the rest, residue and remainder of my estate I give, devise and bequeath as follows, to-wit:

“One-half to the Chicago Relief and Aid Society of Chicago, Illinois, a corporation duly established by law to have and to hold to said corporation, and its assigns, forever, but in trust, however, to hold, manage, invest and control the same, and the same from time to time reinvest, and the income thereof to use and expend for the objects and purposes for which said society was established.

“And the remaining one-half to Frederick Eugene Hammond, now known as Frederick E. Wadhams, absolutely, forever.

“Thirty-fourth. In case any of the institutions or corporations which under and by virtue of this my last will shall receive any portion of my estate, shall at any time fail or cease to carry out effectively the objects and purposes for which they were respectively organized, and to promote which the bequests to them respectively are by me herein made and given, then it is my will, and I do hereby declare that the bequests made in this will to any such institution or corporation shall be held inoperative and void, and for that cause

be and become canceled, revoked and annulled, and the same shall be held and disposed of as a lapsed legacy.”

The theory of the bill is that by reason of lapse of time and failure to use the bequests for the purposes designated in the thirty-second paragraph of the will, that bequest was subject to forfeiture at the instance of complainant as the heir at law of the testator, and that as such heir at law she has declared the said gift terminated, lapsed and cancelled, and that the same now constitutes a trust fund for her in the hands of the Old People's Home under and by virtue of the provisions of the thirty-fourth paragraph of the will. And that the specific bequest made in the thirty-third paragraph has likewise failed and now constitutes a trust fund for complainant in the hands of the defendant Home.

It is to be noted that the complainant does not allege in her bill that the Old People's Home has failed or ceased to carry out effectively the objects and purposes for which it was organized and to promote which, that is to say, such objects and purposes, said bequests were made. On the contrary, the bill alleges that the Old People's Home has received and now holds, securely invested, the fund of \$30,000 so bequeathed to it for the charitable uses and purposes specified, and that said fund has increased by judicious investment to the sum of \$71,900; that said Old People's Home is a corporation organized under the laws of the State of Illinois, not for pecuniary profit, but for the charitable purpose of providing a home for old people, and that it has secured from various sources a sum of money exceeding \$1,000,000, which it now holds and uses for its corporate purposes. The bill does not allege that the will provides (and the fact is the will does not so provide) that the bequest shall be forfeited in case of failure to erect a suitable building to be used as a Home for Old Men of American Birth only, as provided in the thirty-second paragraph of the will. The bill alleges and the

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will provides, that only in case the Old People's Home shall at any time fail or cease to carry out effectively the objects and purposes for which it was organized, that the bequests made in the will should be forfeited. It is clear, we think, from a study of the bill, that the only condition on which it can be claimed that the bequests in question are subject to forfeiture is not alleged to have occurred, but that the bill, on the contrary, shows affirmatively that such condition has not occurred.

Forfeitures are never favored by courts of equity, and gifts for charitable purposes are the special care of such courts. By the terms of the will the bequest in question was made to the Old People's Home, not merely to use and expend in the erection of a suitable building to be used as a Home for Old Men of American Birth only, but as indicated in paragraph thirty-four of the will to promote the objects and purposes for which said Old People's Home was organized. It follows, we think, that before any forfeiture of said bequest can be made, it must be clearly shown that the Old People's Home has failed or ceased to carry out effectively the objects and purposes for which it was organized.

It is also a well-settled rule that in the event of non-user or misuser of a gift for charitable uses, the remedy is not the forfeiture of the property to the grantor, or his heirs, unless the trust is coupled with a condition to that effect, but by a proceeding in equity to enforce the trust. 5 Am. & Eng. Encyc. of Law (2nd Ed.) 915; *Stuart v. City of Easton*, 74 Fed. 854; *In re Mercer Home*, 162 Pa. St. 232; *People v. Cogswell*, 113 Cal. 129; *Mills v. Davison*, 54 N. J. Eq. 659; *Green v. Blackwell* (N. J.) 35 Atl. 375; *Associate Alumni v. Theological Seminary*, 163 N. Y. 417; *Strong v. Doty*, 32 Wis. 381.

The law raises every intendment in favor of a charity against the grantor or those claiming under him. *McKissick v. Pickle*, 16 Pa. St. 140.

Furthermore, the bill does not even allege that a reasonable time for the construction of a suitable building to be used as a Home for Old Men of American Birth only has expired. Whether or not such reasonable time has expired is necessarily a question of fact, depending upon many circumstances and conditions, such as adequacy of the fund for the purpose contemplated, and the immediate demand or need therefor, which the testator may well be considered to have left to the discretion of the Trustees of the Old People's Home, and which, in any event, is a fact to be ascertained and determined by the court under proper allegations before it can be determined whether or not a good reason for forfeiture on that ground is shown. If it be conceded that the condition upon which the forfeiture sought by the bill might be declared was that the building contemplated must be erected within a reasonable time, it may very well be contended that in order to effectively carry out the purposes of such bequest, it was necessary to let the fund accumulate until it reached such an amount as would enable the Old People's Home to erect a suitable and adequate building and maintain the same out of the income from the balance of said fund; and, further, that it would be improvident to invest the entire sum in the erection of a building for the purpose contemplated, unless an adequate endowment was provided, from the income of which the building might be maintained. Certainly the testator's heir at law, in the absence of any showing whatever as to the reasonableness or unreasonableness of the time elapsed, or the adequacy of the fund available for the purpose contemplated, could not declare a valid forfeiture of the legacies, nor would a court of equity, in the absence of such a showing declare such forfeiture at the instance of the heir.

There is, in our opinion, a more fundamental objection to the bill. The complainant, as heir at law of the testator, has no right or interest in the fund in question.

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By the terms of the will the testator's entire interest in the fund in controversy passed to the Old People's Home.

Assuming, as claimed by counsel for plaintiff in error, and we think the claim is sound, that the law of this State is, as stated in *Carper v. Crawl*, 149 Ill. 465, and *Hobbie v. Ogden*, 178 Ill. 357, that the principles applicable to the vesting of real estate apply generally in case of personal property, certainly where such personal property consists of the proceeds of sale of real estate, and, applying established principles to the construction of the will, the purpose and effect thereof, so far as the same relates to the matter in controversy, are plain, and it conclusively appears that all lapsed or void gifts of personal property fall into a general residuary bequest instead of being an intestate estate descending to the heirs at law, then plaintiff in error has not and cannot have any right or interest in the fund in question in any possible event. That such lapsed gifts of personal property fall into the general residuary bequest of the will is well settled. *Crerar v. Williams*, 145 Ill. 625; *Dorsey v. Dodson*, 203 Ill. 32; *Crawford v. Mound Grove Cemetery Ass'n*, 218 Ill. 399.

By the thirty-third paragraph of his will the testator gave, devised and bequeathed all the rest, residue and remainder of this estate, one-half to the Chicago Relief and Aid Society of Chicago, a charitable corporation, and the remaining half to Frederick Eugene Hammond, otherwise known as Frederick E. Wadhams. Paragraph thirty-four must, therefore, be construed as if there had been added thereto the words "and shall thereupon go to and become the property of said Chicago Relief and Aid Society of Chicago, and said Frederick E. Wadhams, in equal shares," or equivalent words. As to the one-half of the fund, therefore, which by such conditional limitation over in the event contemplated, that is, the failure of the Old People's Home to carry out effectively its corporate purposes,

would go to the Chicago Relief and Aid Society, there can be no possible doubt that such conditional limitation would be valid and effective and not obnoxious to the rule against perpetuities, for the simple reason that the Chicago Relief and Aid Society is a charitable corporation. *Jones v. Habersham*, 107 U. S. 174; *Hopkins v. Grimshaw*, 165 U. S. 342; *Andrews v. Andrews*, 110 Ill. 223; *Crerar v. Williams*, *supra*.

In *Jones v. Habersham*, *supra*, a testator had made devises to several charitable corporations for certain specified purposes, and then provided that if either one or more of said devisee corporations should attempt to sell, alienate or otherwise dispose of the property and estate so devised contrary to the terms and conditions set forth in his will, his executors or legal representatives should repossess and enter upon said property or estate as to which the condition might be so broken or violated, and, in that event, gave the property so entered upon and repossessed to Savannah Female Orphan Asylum, another charitable corporation. Commenting upon this provision of the will, the Court said (p. 185):

“There is nothing in this clause by which the heirs at law or next of kin can be benefited in any possible view. If the conditions against voluntary alienation and levy of execution are invalid, the previous devises stand good. If these conditions are valid, the devise over to the Savannah Female Orphan Asylum, an undoubted charity, will take effect; for, as the estate is no more perpetual in two successive charities than in one charity, and as the rules against perpetuities does not apply to charities, it follows that if a gift is made to one charity in the first instance, and then over to another charity upon the happening of a contingency, which may or may not take place within the limit of that rule, the limitation over to the second charity is good.”

In full accord with the above is *Church in Brattle Square v. Grant*, 3 Gray (Mass.) 142. That case covers not only the validity of the limitation over to the

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Chicago Relief and Aid Society, but also the question that plaintiff in error cannot be benefited in any possible view by the provisions in the thirty-fourth paragraph of the will. That question we now proceed to consider.

As to the remaining half of the fund, the only condition or limitation annexed thereto is found in paragraph thirty-four of the will. But for that provision of the will the Old People's Home would doubtless have taken an absolute estate or interest in the fund. Based upon paragraph thirty-four, and because Frederick E. Wadhams was also a specific legatee under the will, the contention is made on behalf of the complainant, plaintiff in error, that Wadham's share of such void or lapsed legacy would not fall into the residuary estate and be governed and controlled by paragraph thirty-three of the will, but would go to complainant, and *Crawford v. Mound Grove Cemetery Ass'n, supra*, is relied upon to support the contention. By the eleventh clause of the will before the court in that case, \$25,000 and certain real estate was given to the Helen Huling Home to be held and managed as an endowment for the maintenance of the Home. No such institution was in existence when the will spoke, and the question was whether the lapsed gifts became intestate estate, or went into the residuum under the twelfth clause of the will; and under the authority of *Dorsey v. Dodson, supra*, it was held that the gifts became intestate estate. But no such question as that decided in *Crawford v. Mound Grove Cemetery Ass'n* and *Dorsey v. Dodson* arises in this case. When the bill was filed in this case Wadhams was living, and the question is not what would have become of the special legacy to Wadhams had he died prior to the death of the testator and such special legacy had lapsed. The reason for the exception to the general rule stated in *Dorsey v. Dodson* has no application in this case.

The provisions of paragraph thirty-four did not create simply an estate on condition subsequent, but

a conditional limitation, that is, a condition followed by a limitation over to a third person in case the condition be not fulfilled, or there be a breach of it. The limitation over is in the nature of an executory devise. As said in *Church in Brattle Square v. Grant, supra*:

“When an estate in fee is created on condition, the entire interest does not pass out of the grantor by the same instrument or conveyance. All that remains, after the gift or grant takes effect, continues in the grantor, and goes to his heirs. This is the right of entry, as we have already seen, which, from the nature of the grant, is reserved to the grantor and his heirs only, and which gives them the right to enter as of their old estate, upon the breach of the condition. This possibility of reverter, as it is termed, arises in the grantor, or deviser, immediately on the creation of the conditional estate. It is otherwise where the estate in fee is limited over to a third person in case of a breach of the condition. Then the entire estate, by the same instrument, passes out of the grantor or deviser. The first estate vests immediately, but the expectant interest does not take effect until the happening of the contingency upon which it was limited to arise. But both owe their existence to the same grant or gift; they are created *uno flatu*; and being an ultimate disposition of the entire fee, as well after as before the breach of the condition, there is nothing left in the grantor or deviser or his heirs. The right or possibility of reverter, which on the creation of an estate in fee on condition merely, would remain in him, is given over by the limitation which is to take effect on the breach of the condition.

“One material difference, therefore, between an estate in fee on condition and on a conditional limitation, is briefly this: that the former leaves in the grantor a vested right, which, by its very nature, is reserved to him, as a present existing interest, transmissible to his heirs: while the latter passes the whole interest of the grantor at once, and creates an estate to arise and vest in a third person, upon a contingency, at a future and uncertain period of time.”

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In the above case the question in dispute was as to the title to real estate devised by the testatrix to a church upon a condition substantially the same in its legal effect as the condition mentioned in paragraph thirty-four of testator's will, with the express provision that upon the breach of such condition the bequest was to be void and of no force, and the property devised was thereupon to revert to the estate of the testatrix and to go to her nephew, who was also the residuary devisee, and his heirs forever.

It will be seen from the above statement that the four corners of the will here under review correspond with those of the will under consideration in the above-cited case, so far as it relates to the question before us for decision. The cases cannot be differentiated. The court held that the heirs at law of the testatrix had no interest whatever in the property; that the limitation over to the residuary devisee was void for remoteness, but that the effect of the invalidity of the limitation over was to vest the first taker, the church, with an entire interest or absolute fee in the property, as if the devise had been originally free from any limitation over.

This rule as to the effect of a void limitation over is the settled law of this State. Kales on Future Interests, sec. 183; *Post v. Rohrbach*, 142 Ill. 600; *Howe v. Hodge*, 152 Ill. 252; *Nevitt v. Woodburn*, 190 Ill. 283; *Chapman v. Cheney*, 191 Ill. 574.

As heir at law of Seth Wadhams, the complainant, plaintiff in error has, therefore, no interest in the fund in question. The decree is affirmed.

Affirmed.

**Benjamin J. Rosenthal and Louis Eckstein, Appellees,
v. Board of Education of the City of Chicago, Ap-
pellant.**

Gen. No. 19,869. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed and remanded with directions. Opinion filed December 22, 1914. Rehearing denied January 5, 1915.

Statement of the Case.

Suit by Benjamin J. Rosenthal and Louis Eckstein against the Board of Education of the City of Chicago to enjoin the enforcement of an appraisal of two lots, made to determine the rental of such lots for the period of ten years, under certain leases. A decree was entered not granting the specific relief prayed for in the complainants' bill, but setting aside the appraisal and fixing the value of the premises and the rental to be paid, and the defendant appealed.

RICHARD S. FOLSOM and ANGUS ROY SHANNON, for appellant.

DONALD L. MORRILL and MAYER, MEYER, AUSTRIAN & PLATT, for appellees.

MR. JUSTICE SMITH delivered the opinion of the court.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 295*—*when reappraisal in action for injunction unauthorized.* In a suit to enjoin the enforcement of an appraisal of property under a lease, the action of the court in setting aside the appraisement and making a new appraisement is unauthorized when such relief was not sought by either party.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Rosenthal et al. v. Board of Education, 190 Ill. App. 167.

2. LANDLORD AND TENANT, § 295*—*when tenants estopped to object to appraisal.* In a suit to enjoin the enforcement of an appraisal of school property under a lease, the conduct of the complainants in notifying the lessor of the assignment of the leases covering two lots, in occupying both lots jointly for their firm business, in paying rents for both lots in lump sums and in failing to notify the lessor of any transfers of the leases between themselves, operated as an equitable estoppel and prevented relief on the theory that the lots should have been appraised separately.

3. LANDLORD AND TENANT, § 295*—*when bill to enjoin appraisal will be dismissed.* A bill seeking to enjoin an appraisal of school property under a lease, on the theory that the two lots involved should be appraised separately, and that the joint appraisal was void, wherefore the rental for the ensuing ten years should under the lease, be the same as for the prior ten years, will be dismissed where it appears that the complainants made no such protest until after the appraisal and time for correction, and the lease provided that the lessees should be estopped from objecting to matters connected with the action of the appraisers unless objected to within thirty days.

4. LANDLORD AND TENANT, § 295*—*when bill to enjoin appraisal fails to show offer to do equity.* In a suit to enjoin an appraisal of school property under a lease, where the complainants contended that a joint appraisal of two lots was void, wherefore the rental under the lease should be the same for the ensuing ten years as for the prior ten years, but such complainants did not offer to pay rental in accordance with a reformed appraisal, there was no offer to do equity; and since the complainants did not show injury by the appraisal, the bill would be dismissed.

5. LANDLORD AND TENANT, § 294*—*when action of appraisers binding.* The action of appraisers in determining rental under a lease of school property is binding on the parties unless there is fraud or mistake.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Fred Miller Brewing Company, Appellant, v. George Jones and Jacob Portz, Jr., Appellees.

Gen. No. 19,920. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. JESSE A. BALDWIN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed and remanded. Opinion filed December 22, 1914.

Statement of the Case.

A judgment by confession for \$1,064.30 against George Jones and Jacob Portz, Jr., in favor of the Fred Miller Brewing Company was entered on a *narr.* and *cognovit*. Upon motion by both defendants leave was given to plead to the declaration, the judgment to stand as security, whereupon the defendants filed a plea of general issue. At the trial the jury returned a verdict for the defendants, and judgment being entered the plaintiff appealed.

WINSTON, PAYNE, STRAWN & SHAW, for appellant; EDWARD W. EVERETT and ARTHUR C. MARRIOTT, of counsel.

COBURN & BENTLEY and WILLIAM J. BRYANT, for appellees.

MR. JUSTICE SMITH delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 333*—*when breach of contract not justified*. Evidence held to show a breach of contract under which a brewery loaned two persons a sum of money and certain furniture, it being agreed that such persons should sell only the beer manufactured

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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by such brewery, and the breach of such contract was not justified by evidence showing that on two occasions when beer was ordered, someone at the brewery told such persons that they would have to wait for the delivery of their order.

2. EVIDENCE, § 173*—*when evidence of telephone conversation admissible.* Evidence of a telephone conversation with an agent of plaintiff is erroneously admitted where it is not shown who answered the call, that he was known to the witness or recognized as an agent of the plaintiff, or authorized to speak for such plaintiff.

3. PRINCIPAL AND AGENT, § 225*—*who has burden of proving authority of agent.* The burden of proof of authority of an agent is on the party dealing with such agent.

4. PRINCIPAL AND AGENT, § 240*—*when evidence of agent admissible to bind principal.* Evidence of an agent is not admissible to bind his principal where his authority is not shown.

5. WITNESSES, § 209*—*what cross-examination improper.* Where a witness' testimony on direct examination was limited solely to identification of signatures on a judgment note, questions asked on cross-examination as to the witness' duties, were improper.

John Chrystal, Appellee, v. John S. Level, Appellant.

Gen. No. 19,926. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. JOHN P. McGOORTY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed December 22, 1914.

Statement of the Case.

A judgment by confession was entered on a judgment note for fourteen hundred and forty dollars made by John S. Level and David H. Craig payable to John Chrystal. Afterwards the judgment was opened and the defendants given leave to plead, whereupon they filed pleas of the general issue, failure of consideration and want of consideration. At the trial a judg-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Morrison v. O'Brien, 190 Ill. App. 171.

ment was entered for the plaintiff and the defendant Level appealed.

RANKIN, HOWARD & DONNELLY, for appellant.

CHARLES C. SPENCER, for appellee.

MR. JUSTICE SMITH delivered the opinion of the court.

Abstract of the Decision.

BILLS AND NOTES, § 50*—*when judgment note not void for want or failure of consideration.* Where a judgment note was given in settlement of a lawsuit and also in consideration of a balance due on two promissory notes which were surrendered and marked paid, there was a good consideration for the judgment note; and in an action on such judgment note it could not be contended that there was want of consideration or failure of consideration.

Elizabeth Morrison, Executrix, et al., v. George I. O'Brien.

On appeal of William Sullivan, Appellant, v. Austin State Bank, Appellee.

Gen. No. 19,941. (Not to be reported in full.)

Appeal from the Superior Court of Cook county; the Hon. MARCUS A. KAVANAGH, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed December 22, 1914. Rehearing denied January 5, 1915.

Statement of the Case.

The proceedings, issues and facts in this litigation up to the time of the filing of the bill of review herein are set out fully in *Austin State Bank v. Morrison*, 133 Ill. App. 339.

Upon the filing of the bill of review by the Austin State Bank in pursuance of such decision, issues were

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Morrison v. O'Brien, 190 Ill. App. 171.

duly formed and the cause referred to a master. The findings of such master fully sustained the bill of review. And a decree was entered in favor of the Bank finding that such Bank was the sole owner of the warrants issued to the treasurer of the town of Cicero, that the amount of the warrants had been paid to the receiver, Zimmer, of the firm of J. J. Morrison & Co. & O'Brien, and that the Bank was entitled to receive from Zimmer the sum of \$2,208.50, being the proceeds of the warrants less the receiver's costs of \$760.70, leaving a balance due of \$1,447.80.

The decree entered on the same day in favor of George I. O'Brien found that the bill of complaint in the original cause should be dismissed for want of equity; that George I. O'Brien should receive from the receiver the sum of \$808.80 and the sum of \$534.21, less his share of the receiver's costs, and that the balance of \$798.63 was the amount in the hands of the receiver and represented the interests of George I. O'Brien in the effects of the copartnership firm of J. J. Morrison & Co. & O'Brien. The decree also found that O'Brien's interest was assigned to J. B. O'Connell and ordered that O'Connell recover the sum of \$798.63 from the receiver and \$544.38 from the original complainants. From such decrees William Sullivan, one of the original complainants, appealed.

EDWIN C. CRAWFORD, for appellant.

CASTLE, WILLIAMS, LONG & CASTLE, for appellee.

F. A. McDONNELL, for George I. O'Brien.

MR. JUSTICE SMITH delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1236*—*when appellant cannot complain of decree.* Where certain complainants abandoned an original bill for an accounting and dissolution of a partnership, and prosecuted

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Morrison v. O'Brien, 190 Ill. App. 171.

their suit for the sole purpose of determining whether a bank was entitled to certain warrants purchased from a third person who had obtained them from a member of the partnership, they could not be heard to claim, as a basis for a reversal of decrees entered on a bill of review, that there was no proof by which the court could determine the share of a member of the partnership in its assets.

2. APPEAL AND ERROR, § 484*—*when master's report must be objected to.* An appellant who makes no objections to a master's report or exceptions thereto, raising the question of want of proof on an issue presented by the original bill, although ruled to make proof on such bill, cannot raise the question for the first time on appeal.

3. EQUITY, § 582*—*what relief is proper on bill of review.* Where decrees entered on a bill of review sought to terminate a receivership of a partnership by dismissal of the original bill under which the receiver was appointed, it was proper and equitable to require proceeds of warrants in the hands of the receiver to be paid to a bank from which the warrants were received, and it was also equitable and proper to decree that money received from a partner be returned to such partner or his assignee, after deducting a share of the expenses of the receiver.

4. DISMISSAL, NONSUIT AND DISCONTINUANCE, § 38*—*when bill for partnership accounting will be dismissed.* It is equitable and proper to dismiss a bill for partnership accounting where no evidence is offered supporting the bill or where the evidence leaves the matter in such a state that it is impossible for the court to state an account.

5. EQUITY, § 431*—*when exceptions to master's report are necessary.* An appellant who files no exceptions to a master's report recommending the return of proceeds and moneys is bound thereby.

6. EQUITY, § 473*—*when right of intervenor in action not affected by original bill.* In an action for a partnership accounting, where a bank intervened and claimed to be entitled to proceeds of warrants purchased from a third person, after such person had obtained such warrants from one of the partners for services rendered, the right of the bank was not affected by the accounting and it was not required to enter upon proofs as to such accounting.

7. APPEAL AND ERROR, § 493*—*when appellant cannot complain of decree.* Where the right of a partner to moneys in the hands of a receiver was not questioned by partners seeking a dissolution and accounting, and they abandoned their claim to an accounting from such partner, they could not complain of a decree awarding the money to the partner.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

W. W. Kimball Co. v. Polakow et al., 190 Ill. App. 174.

W. W. Kimball Company, Appellant, v. Samuel Polakow and Virginia Volini, Appellees.

Gen. No. 19,952.

1. CHATTEL MORTGAGES, § 3*—*what is nature of chattel mortgage.* The chattel mortgage was unknown to the common law, it being the rule that all sales and pledges of personalty were void unless possession accompanied and went with the title or to the pledgee.

2. CHATTEL MORTGAGES, § 1*—*how statute is construed.* A chattel mortgage is valid only when the requirements of the statute have been strictly complied with, and the statute being in derogation of the common law is to be construed strictly.

3. CHATTEL MORTGAGES, § 46*—*how mortgage must be acknowledged and recorded.* A chattel mortgage not acknowledged and recorded as prescribed by statute is invalid as to third persons.

4. CHATTEL MORTGAGES, § 55*—*when acknowledgment does not comply with statute.* A chattel mortgage not acknowledged by the owner in person, but acknowledged by his attorney in fact, is not acknowledged in compliance with the statute and is invalid as to a person who claims to own the property as a purchaser.

Appeal from the Superior Court of Cook county; the Hon. THOMAS N. JETT, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed December 22, 1914.

ABRAHAM PRIVAT and WILLIAM S. CORBIN, for appellant; WILLIAM S. CORBIN, of counsel.

SIMEON STRAUS and IRA E. STRAUS, for appellee Virginia Volini.

MR. JUSTICE SMITH delivered the opinion of the court.

This appeal is from a decree of the Superior Court sustaining the demurrer of Virginia Volini, appellee, to the bill of W. W. Kimball Company, appellant, to foreclose a chattel mortgage upon a pipe organ in the building known as the "Douglas Park Auditorium." The

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

chattel mortgage was made by Samuel Polakow, then the owner of the building. It was signed by him in person, but was not acknowledged by him in person. It was acknowledged by one R. H. Murphy, as attorney in fact for Polakow, under and by virtue of a power of attorney empowering him to acknowledge the mortgage. No other power was given. Copies of the chattel mortgage and power of attorney are attached to the bill as exhibits and made a part thereof.

The bill alleges that Polakow by deed conveyed the real estate, "together with certain furniture and furnishings then in said building to Virginia Volini; and she now claims to be the owner of said pipe organ by virtue of said deed. * * * That Virginia Volini took possession of premises and now holds said pipe organ and claims same to be an appurtenance to said building."

By these averments of the bill the ownership of the building by appellee is set up by purchase from Polakow under and by virtue of the deed. The bill does not question the title of appellee to the real estate including the building. It simply asks for a foreclosure of the chattel mortgage. Appellee demurred to the bill and the court sustained the demurrer and dismissed the bill for want of equity.

By the demurrer to the bill, the question of the validity of the chattel mortgage was squarely raised, for all the facts connected with its execution, even to the exact form of acknowledgment, were set forth, leaving no room for construction or intendment.

The contentions of appellant are that the bill shows on its face that it was the intention and agreement of appellant and Polakow that the organ and appurtenances should not be attached to or become a part of the freehold; that appellee purchased only the real estate, and that the mortgage, if good as between appellant and Polakow, is good as to appellee; that a chattel mortgage being good as between the parties to it without

W. W. Kimball Co. v. Polakow et al., 190 Ill. App. 174.

acknowledgment is equally good against all persons who are neither purchasers of the mortgaged chattels nor creditors of the mortgagor, and have no interest in the property; and, lastly, that the acknowledgment of the chattel mortgage by an attorney in fact for the mortgagor was valid.

On the other hand, appellee contends that chattel mortgages were unknown to the common law; that only by virtue of the statute have they any existence, and they exist only when the statutory requirements have been complied with; that the statute does not authorize the execution or acknowledgment of chattel mortgages by anyone but the owner in person, and, hence, the chattel mortgage of appellant is invalid.

The chattel mortgage, as we know it, was unknown to the common law. At the common law all sales and pledges of personal property were void unless possession accompanied and went with the title or to the pledgee. *Frank v. Miner*, 50 Ill. 444, 447. It is not debatable that a chattel mortgage is a creature of the statute, and that it is valid only when the requirements of the statute have been strictly complied with; and, further, that the statute being in derogation of the common law is to be construed strictly. *Porter v. Dement*, 35 Ill. 478; *Harding v. Thuet*, 124 Ill. App. 437, 442; *Second Nat. Bank of Monmouth v. Thuet*, 124 Ill. App. 501-504. A chattel mortgage not acknowledged and recorded as prescribed by the statute is invalid as to third persons, although it may be effective between the parties to it.

We find no provision in the Chattel Mortgage Act, chapter 95, R. S. (J. & A. ¶¶ 7576 *et seq.*), authorizing or empowering any attorney in fact to do any of the things required of the owner by the act to make a valid chattel mortgage; nor do we find any authority conferred on the owner to acknowledge a chattel mortgage by his attorney in fact. We hold, therefore, that the mortgage signed by Polakow and not acknowledged by

him in person, but acknowledged by his attorney in fact, was not acknowledged in compliance with the provisions of the statute and is invalid as against appellee, who is charged by the bill as claiming to own the property as a purchaser.

Apparently this question has never before been directly raised. We may, therefore, legitimately support our conclusion thereon by reasoning by analogy from the Statute of 1833, providing for the recording of town plats, and the construction given the provisions of the act prior to the Statute of 1874, section 2, ch. 109, R. S. (J. & A. ¶ 8518), entitled "Plats," which provides that: "The plat having been completed, shall be certified by the surveyor and acknowledged by the owner of the land, *or his attorney duly authorized* in the same manner as deeds," etc. The words "or by his attorney duly authorized" were added by the law of 1874. The statute prior to 1874 was silent as to the acknowledgment by an attorney in fact, just as our Chattel Mortgage Act is silent. It was held under the Act of 1833, that an attorney in fact was not authorized to acknowledge such plats, and that a plat so acknowledged would not vest the legal title of the streets in the corporation. *Gosselin v. City of Chicago*, 103 Ill. 623; *Earll v. City of Chicago*, 136 Ill. 277; *Thomsen v. McCormick*, 136 Ill. 135; *City of Mt. Carmel v. Shaw*, 155 Ill. 37, 42; *City of Alton v. Fishback*, 181 Ill. 396; *Ryerson v. City of Chicago*, 247 Ill. 185.

Acknowledgment of a conveyance, where the acknowledgment is necessary to its validity, has always been held to be a part of the execution. It is a part of the execution of a chattel mortgage. The execution of a mortgage must be one act and cannot be divided.

The decree is affirmed.

Affirmed.

Mason v. Kobliska, 190 Ill. App. 178.

William E. Mason, Executor, Appellee, v. Susan Kobliska et al., on appeal of James H. Hooper and Ona A. Hooper, Appellants.

Gen. No. 19,970. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. JOHN GIBBONS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed December 22, 1914. Rehearing denied January 5, 1915.

Statement of the Case.

Bill for foreclosure by William E. Mason, executor, against Susan Kobliska and others, alleging as a ground for declaring the whole indebtedness due that taxes legally levied were not paid and that the premises were sold for said taxes, and that there had been no redemption from the sale. The usual form of a foreclosure decree was entered upon a master's report recommending such decree, and James H. Hooper and Ona A. Hooper appealed.

JAMES H. HOOPER, *pro se*.

A. G. DICUS, for appellant Ona A. Hooper.

CHARLES E. POPE, for appellee.

MR. JUSTICE SMITH delivered the opinion of the court.

Abstract of the Decision.

1. **APPEAL AND ERROR, § 943***—*when party cannot object to record.* On appeal from a foreclosure decree, a contention that no evidence is contained in the record showing a tax sale or deed on the mortgaged property, warranting foreclosure cannot be sustained

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Jarneck v. Chicago Consolidated Trac. Co., 190 Ill. App. 179.

where it appears that the appellee was not afforded an opportunity to supply such defect, and where a transcript of additional parts of the record was filed subsequent to the filing of briefs showing the tax sale.

2. MORTGAGES, § 394*—*what is sufficient election to declare whole debt due.* The determination of a holder of notes to file a bill for the foreclosure of a trust deed for the entire indebtedness, and the preparation and filing of such bill, is a sufficient election to declare the whole sum due, and to entitle him to maintain the bill.

**Elmer W. Jarneck, Appellee, v. Chicago Consolidated
Traction Company, Appellant.**

Gen. No. 19,979. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. H. STERLING POMEROY, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed December 22, 1914.

Statement of the Case.

Action by Elmer W. Jarneck against the Chicago Consolidated Traction Company for personal injuries. There were four trials of the case, including the trial on review, and there were two appeals prior to the present appeal. See *Jarneck v. Chicago Consolidated Traction Co.*, 150 Ill. App. 248, 175 Ill. App. 424. In the opinion filed in the second appeal is a general statement of the pleadings and evidence.

JOHN E. KEHOE and FRANK L. KRIETE, for appellant;
W. W. GURLEY and JOHN R. GUILLIAMS, of counsel.

EMERY S. WALKER, for appellee.

MR. JUSTICE SMITH delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Jarneck v. Chicago Consolidated Trac. Co., 190 Ill. App. 179.

Abstract of the Decision.

1. **APPEAL AND ERROR, § 1734***—*when former decision is law of case.* A holding on a prior appeal that evidence failed to sustain a charge of negligence is not binding on a subsequent appeal where the evidence is materially different.

2. **MASTER AND SERVANT, § 161***—*what duties of master cannot be delegated.* The duty of inspection of appliances is on the master and cannot be delegated.

3. **MASTER AND SERVANT, § 123***—*what are duties as to safe place of work.* A master is bound to furnish a servant with a safe place in which to work, and noncompliance with this duty is not one of the ordinary risks assumed by the servant.

4. **MASTER AND SERVANT, § 123***—*what is extent of master's duty as to place of work.* The duty of the master to furnish a safe place of work is continuing, and if the place is made unsafe by reason of the master's negligence without the servant's knowledge, the master is liable for the injury.

5. **MASTER AND SERVANT, § 447***—*when servant may rely on care of master.* A servant may assume that a master has provided a safe place of work, unless he has notice of the danger or the unsafe condition is obvious, in which case he assumes the risk.

6. **MASTER AND SERVANT, § 714***—*what is question for jury.* In an action for injuries sustained by a servant, the question whether wire on a street car was out of order when such servant took charge of the car was for the jury, the defect not being apparent, and since the evidence was sufficient to sustain a finding of negligence the verdict would not be interfered with.

7. **MASTER AND SERVANT, § 777***—*when instruction not misleading.* In an action for personal injuries, an instruction that the jury was not bound to consider the evidence evenly balanced when two witnesses contradicted each other, but that the surrounding facts might be considered, was not erroneous as misleading or as invading the province of the jury.

8. **MASTER AND SERVANT, § 807***—*when instruction as to assumed risk not erroneous.* In an action for personal injuries, an instruction that a servant is not bound to inspect appliances but may assume that they are safe, and that such servant is only bound to take notice of such defects as actually come to his knowledge, or would be disclosed by ordinary care, and applying such rules to the evidence, was not misleading or inapplicable.

9. **MASTER AND SERVANT, § 790***—*what facts may be assumed in instruction.* In an action by a servant for personal injuries,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Bergman v. The Empire Tea Co., 190 Ill. App. 181.

where there was no controversy that a defect in a street car existed at the time of the injury, such defect could be assumed to exist in an instruction as a fact.

10. DAMAGES, § 110*—*when verdict not excessive*. A verdict of five thousand dollars for personal injuries *held* not excessive, or the result of passion of prejudice, or improper argument of counsel.

Otto Bergman, Defendant in Error, v. The Empire Tea Company, Plaintiff in Error.

Gen. No. 20,005. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. CHARLES A. WILLIAMS, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed December 22, 1914.

Statement of the Case.

Action for injuries to a horse and buggy by Otto Bergman against The Empire Tea Company, a corporation. A judgment was rendered in favor of the plaintiff, and the defendant brought error.

CHARLES W. STIEFEL, for plaintiff in error; JOHN B. HEINEMANN, of counsel.

COBURN & BENTLEY, for defendant in error.

MR. JUSTICE SMITH delivered the opinion of the court.

Abstract of the Decision.

1. ANIMALS, § 43*—*when evidence shows negligence in management*. Evidence *held* to warrant a finding that a driver of a horse and wagon was guilty of negligence in placing the horse in a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Hartman v. Western Cold Storage Co., 190 Ill. App. 182.

dangerous place, under an elevated railroad track, and taking the bridle bit out of the mouth of the horse and leaving it unhitched and unfettered while he was engaged on some errand at the wagon.

2. **ANIMALS, § 43***—*when evidence sufficient to show cause of injury.* Evidence held to show that a collision due to a horse running away was the cause of the loss of another horse which died shortly after such collision.

**Jacob Hartman et al., trading as Hartman Brothers,
Defendants in Error, v. Western Cold Storage
Company, Plaintiff in Error.**

Gen. No. 20,037.

1. **TROVER AND CONVERSION, § 31***—*when demand on public warehouseman sufficient.* In an action against a public warehouseman for conversion of property, the demand for the property must be made either by the holder of the receipt or the depositor of the goods, accompanied with an offer to satisfy the warehouseman's lien, an offer to surrender the receipt properly indorsed, and a readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the warehouseman. (Hurd's R. S. 1913, p. 1897, par. 248, sec. 8, J. & A. ¶ 9007.)

2. **TROVER AND CONVERSION, § 32***—*when denial of defense erroneous.* In an action against a public warehouseman for conversion of property, the refusal to allow the defendant to file an additional defense setting up its claim for lien, was error when the motion was made before the trial, since, if the plaintiffs were surprised, they could have taken a continuance.

3. **TROVER AND CONVERSION, § 32***—*when defendant has burden of proof.* In an action against a public warehouseman for conversion of property, the defendant had the burden of sustaining a defense of a claim for lien.

4. **TROVER AND CONVERSION, § 47***—*when measure of damages not shown.* In an action against a public warehouseman for conversion of a carload of onions, there was no competent evidence as to the measure of damages where one witness testified that the onions were worth fifty cents a bushel, but the evidence did not show how

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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many bushels there were, and where another witness testified that there were about five hundred sacks, worth fifty cents a sack, but there was no evidence as to the kind, quality or condition of the onions.

Error to the Municipal Court of Chicago; the Hon. JOSEPH S. LA BUY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Reversed and remanded. Opinion filed December 22, 1914.

CULVER, ANDREWS & KING, for plaintiff in error.

SAMUEL F. KNOX, for defendants in error.

MR. JUSTICE SMITH delivered the opinion of the court.

An action was brought by Hartman Brothers, defendants in error, against the Western Cold Storage Company, plaintiff in error, in the Municipal Court of Chicago, to recover the value of a carload of onions.

The record shows the following facts: April 4, 1913, there was placed in storage with the plaintiff in error by Peters Brothers a carload of onions, consisting of 504 bags, and a receipt for the onions was issued to Peters Brothers, showing that the onions were held for the account of Peters Brothers by the Western Cold Storage Company. The receipt was marked as non-negotiable, as required by law.

April 22, 1913, Peters Brothers made a demand in writing on the plaintiff in error signed "Hartman Brothers, by Peters Brothers, Agents," for the immediate delivery of the onions. The demand was not accompanied by an offer to return the warehouse receipt for cancellation, and the plaintiff in error refused to deliver to Hartman Brothers the onions stored by Peters Brothers, claiming that it had a lien on the onions for moneys due to the plaintiff in error from Peters Brothers, and on the refusal to deliver, the action was brought to recover the value therefor on April 22, 1913. The demand made was not signed by

Hartman v. Western Cold Storage Co., 190 Ill. App. 182.

Hartman Brothers or any of the members of that firm, but was signed by Peters Brothers as agents. The action was for conversion of the property, and it was incumbent upon Hartman Brothers to show a proper and legal demand upon the Storage Company, plaintiff in error, before they could recover. As the defendant was a public warehouseman and the statutes governing its action prescribed what a legal demand should be and contain, and that the demand must be made either by the holder of the receipt or the depositor of the goods accompanied with (1) an offer to satisfy the warehouseman's lien; (2) an offer to surrender the receipt properly indorsed; and (3) a readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the warehouseman. Hurd's R. S. 1913, p. 1987, par. 248, sec. 8 (J. & A. ¶ 9007). The evidence in the case fails to show that any such demand was made and fails to show that at any time the defendants in error offered to return or surrender the warehouse receipt. A warehouseman would not be authorized under the statute to give up the goods until the warehouse receipt is returned and cancelled according to the statute; for, under the provisions of the statute, if the property had been given up without taking up and cancelling the receipt, the warehouseman would be liable to any one who purchased the receipt either before or after the goods had been delivered.

We think the court erred in refusing to allow the plaintiff in error to file an additional defense setting up its claim for a lien upon its motion to that effect. The motion was made before the trial was entered upon and should have been allowed. If the plaintiffs were surprised, they could have taken a continuance to investigate the same. It was an affirmative defense and the burden was upon the plaintiff in error to sustain the same, and in furtherance of justice the motion should have been allowed.

Madenberg v. Ritman et al., 190 Ill. App. 185.

No competent evidence was offered in the cause as to the proper measure of damages. While the evidence of Hartman was that onions were worth fifty cents a bushel, the evidence in the record does not show how many bushels there were in this lot of onions, and it would, therefore, be impossible to arrive at the amount of the judgment which was rendered in this case. The evidence of Peters was that they were worth fifty cents a sack and that there were about 500 sacks. There was no evidence as to the kind, quality or condition of the onions. It does not appear that either of the witnesses knew the condition or quality of the property.

The judgment is reversed.

Reversed and remanded.

**Abraham Madenberg, Defendant in Error, v. Solomon
Ritman and L. Feldman, Plaintiffs in Error.**

Gen. No. 20,070. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HARRY M. FISHER, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed December 22, 1914.

Statement of the Case.

Action by Abraham Madenberg against Solomon Ritman and L. Feldman, a partnership, for forty-five dollars claimed to be a balance due on account of wages. A judgment being rendered in favor of the plaintiff, defendants brought error.

SAMUEL MICON, for plaintiffs in error.

VICTOR L. HUSZAGH, for defendant in error.

C. H. Brown Paint Co. v. C. A. Erickson & Bros., 190 Ill. App. 186,

MR. JUSTICE SMITH delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 968*—*when record is insufficient.* On appeal from a judgment for a balance due on account of wages, the statement of facts is insufficient when it does not show all the evidence before the trial court, the record showing evidence of a book of entries which are not contained in the statement of facts.

2. APPEAL AND ERROR, § 1772*—*when judgment will be reversed.* A judgment of the trial court will not be reversed, unless it is contrary to the law and the evidence, or unless the judgment resulted from errors in the trial court directly affecting matters in issue between the parties.

**Charles H. Brown Paint Company, Defendant in Error,
v. C. A. Erickson & Brothers, Plaintiff in Error.**

Gen. No. 20,112. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. JOSEPH S. LA BUY, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed December 22, 1914. Rehearing denied January 5, 1915.

Statement of the Case.

Action for merchandise sold and delivered by Charles H. Brown Paint Company, a corporation, against C. A. Erickson & Brothers, a corporation. The affidavit of plaintiff showed a claim for \$50.45, and defendant's affidavit of merits stated that the claim was paid except a balance of \$7.95, and that some of the material delivered was unfit for use, whereby the defendant sustained damages. From a judgment for the plaintiff, defendant brought error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Kellogg v. Interstate Ind. Tele. & Teleg. Co., 190 Ill. App. 187.

JOHN E. ERICKSON, for plaintiff in error.

BAKER & HOLDER, for defendant in error; W. W. HOOVER, of counsel.

MR. JUSTICE SMITH delivered the opinion of the court.

Abstract of the Decision.

1. PRINCIPAL AND AGENT, § 131*—*when payment to agent does not bind principal.* Evidence of payments to an agent is inadmissible where the agent's authority to receive payments is not shown.

2. SALES, § 401*—*when damages for breach of warranty are not shown.* In an action for goods sold and delivered, where no actual damages are shown by reason of defective and unfit material, such defense is not established.

H. D. Kellogg, Defendant in Error, v. Interstate Independent Telephone & Telegraph Company, Plaintiff in Error.

Gen. No. 20,140. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. OSCAR M. TORRISON, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1914. Affirmed. Opinion filed December 22, 1914.

Statement of the Case.

Action by H. D. Kellogg against Interstate Independent Telephone & Telegraph Company, a corporation, on four coupons issued by defendant in accordance with the provisions of a deed of trust or mortgage given to secure the same.

A motion to strike defendant's affidavit of merits was granted, and when the defendant elected to stand by

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Kellogg v. Interstate Ind. Tela. & Teleg. Co., 190 Ill. App. 187.

its affidavit an order of default was entered, and after hearing evidence the damages were assessed at one hundred dollars, and judgment was entered therefor. To reverse such judgment, defendant brought error.

FRED A. DOLPH and WILLIAM H. GALLAGHER, for plaintiff in error.

CAVENDER, KAISER & WERMUTH, for defendant in error.

MR. JUSTICE SMITH delivered the opinion of the court.

Abstract of the Decision.

1. MORTGAGES, § 390*—*when action on coupons may be maintained.* In an action on coupons issued in accordance with a deed of trust or mortgage, where the statement of claim for the plaintiff was filed on two coupons, and the defendant filed an affidavit of merits that the trust deed prohibited proceedings by bondholders independently of the trustee, and the plaintiff moved to strike the affidavit of merits from the files, and pending a decision of the motion filed an amended statement of claim covering two additional coupons, whereupon the motion to strike was granted, and defendant electing to stand by its affidavit damages were assessed on default, there was no reversible error in the proceedings.

2. MORTGAGES, § 407*—*what defenses are available in action on coupons.* In an action on coupons issued in accordance with a deed of trust or mortgage, an affidavit of merits setting up the defense that the trust deed prohibits proceedings by bondholders independently of the trustee is properly stricken.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Michael P. Gauer v. Edward C. Voltz et al.

**Joseph P. Jené, Appellant, v. George Victor Haering,
Appellee.**

Gen. No. 21,063. (Not to be reported in full.)

Interlocutory appeal from the Superior Court of Cook county;
the Hon. HUGO PAM, Judge, presiding. Heard in the Branch Appel-
late Court. Reversed. Opinion filed December 22, 1914.

Statement of the Case.

Bill by Michael P. Gauer to foreclose a trust deed which was first lien on certain premises, George Victor Haering being a defendant to the original bill. Joseph P. Jené purchased the equity of redemption after the bill was filed and became a party to the suit later. Other parties to the original bill were unknown owners of a third mortgage note and various persons who at one time or another had owned the equity of redemption or who had an interest therein when the bill was filed.

The case was referred to a master, and on his report a decree was entered directing sale. The property was then sold to the first mortgagee for the amount of his claim. After the sale of the second mortgagee, Haering, filed a "cross-bill," praying for a receiver and that rents and profits be applied to pay the second mortgage, as provided by such mortgage. Jené then filed a petition setting up ownership of the equity of redemption and his right to the rents and profits. He was permitted to intervene and plead and demurred to the so-called cross-bill. From an order appointing the receiver as prayed, Jené appealed.

LAIRD BELL, for appellant.

No appearance for appellee.

Gauer v. Voltz, 190 Ill. App. 189.

MR. JUSTICE SMITH delivered the opinion of the court.

Abstract of the Decision.

1. RECEIVERS, § 10*—*when pleading is mere petition for receiver.* A pleading filed by a second mortgagee for the appointment of a receiver and for rents and profits, after the sale of the premises under a foreclosure decree of a first mortgage, which does not ask for an accounting or foreclosure, is a mere motion paper or petition.

2. RECEIVERS, § 10*—*what must be shown to warrant appointment of receiver.* A receiver will not be appointed upon a mere petition, since a receivership must be ancillary to some other relief, and there must be some pleading upon which the petitioner will probably be entitled to specific equitable relief.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

CASES
DETERMINED IN THE
SECOND DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS
DURING THE YEAR 1914

**Frank J. Burns et al., Appellees, v. Illinois Central
Railroad Company, Appellant.**

Gen. No. 5,824. (Not to be reported in full.)

Appeal from the Circuit Court of Kankakee county; the Hon. CHARLES B. CAMPBELL, Judge, presiding. Heard in this court at the April term, 1914. Reversed. Opinion filed April 15, 1914. Rehearing denied October 7, 1914.

Statement of the Case.

Petition by Frank J. Burns and others against the Illinois Central Railroad Company to enforce an attorney's lien. One Joe Lococo and his uncle employed petitioners to prosecute a claim against the defendant for personal injuries sustained by Lococo, and after a disagreement between the petitioners and the uncle the petitioners ceased to act and the matter was placed in the hands of another. The petitioners notified de-

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fendant by letter that they would expect a reasonable compensation in case of settlement. Thereafter the defendant settled with Lococo but his uncle procured another attorney to start suit. In the suit Lococo recovered a verdict for six thousand dollars, which was paid. Petitioners then filed the above mentioned petition for an attorney's lien and a decree was entered in their favor for two hundred dollars. To reverse the decree, defendant appeals.

A former appeal was before the Supreme Court, on the ground that a constitutional question was involved, in *Burns v. Illinois Cent. R. Co.*, 258 Ill. 302.

HUNTER & SCHNEIDER, for appellant; JOHN G. DRENNAN, of counsel.

FRANK J. BURNS, for appellees.

MR. PRESIDING JUSTICE WHITNEY delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1002*—*when sufficiency of evidence to show party was not an attorney not preserved for review.* On appeal from a decree awarding an attorney's lien, defendants cannot raise the question that there was no proof to show that one of the petitioners was an attorney where such issue was not raised by answer to the petition.

2. INFANTS, § 21*—*right to contract for attorney's services.* Attorney's services are necessities for which a minor, or his next friend, may make a binding agreement to pay a reasonable compensation.

3. ATTORNEY AND CLIENT, § 53*—*evidence sufficient to show employment by minor.* Evidence held sufficient to show the employment of attorneys by a minor, where the minor lived at his uncle's house and the uncle engaged the attorneys, and afterwards one of the attorneys had several conversations with the minor and his uncle at the latter's house.

4. ATTORNEY AND CLIENT, § 146*—*sufficiency of notice for lien.* Service of a notice for an attorney's lien by mail is insufficient, since personal service of notice is required.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Severy et al. v. McDougall, 190 Ill. App. 193.

**Elizabeth Severy (nee McDougall) and Ernest Severy,
Defendants in Error, v. Charles G. McDougall et
al., Plaintiffs in Error.**

Gen. No. 5,830.

1. APPEAL AND ERROR, § 395*—*when objections to master's report not saved.* A party will not be heard on review to make objections to the master's report which he did not bring to the attention of the trial court.

2. INTEREST, § 43*—*when only legal rate may be charged.* As against their cotenants, tenants in common with entire charge and control of the premises, receiving the rents and profits, are entitled to only legal interest on amounts paid by them to discharge incumbrances.

3. PARTITION, § 72*—*allowance for improvements.* In an action for partition and an accounting, a decree allowing defendants for certain improvements placed on the land by them on the basis of cost thereof rather than on the basis of the difference in the market value of the land because of such improvements, *held* not erroneous where there was no sufficient evidence as to the market value of the land with and without the improvements, and the allowance appeared to be equitable.

4. PARTITION, § 136*—*when order of proceedings cannot be complained of on review.* The fact that a decree of partition was entered and proceedings had thereunder before the decree for an accounting and proceedings thereunder, by which the interest of the parties in the improvements would be ascertained, cannot be complained of where such order of proceeding was expressly consented to by the party complaining.

5. APPEAL AND ERROR, § 831*—*term at which bill of exceptions must be taken.* In cases at law the bill of exceptions must be taken at the term at which the rulings excepted to were made, or within such time as the court may at that term have granted for that purpose; and this applies whether the ruling excepted to is a final and appealable order or not.

6. APPEAL AND ERROR, § 862*—*certificate of evidence.* The rule that in cases at law bill of exceptions must be taken at the term at which the rulings excepted to were made, or within such time as the court may at that term have granted for that purpose, properly applies to the filing of a certificate of evidence.

7. APPEAL AND ERROR, § 86*—*when motion for leave to file certificate of evidence properly denied.* Denial of motion to grant leave

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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and to extend the time to present a certificate of evidence, held properly denied where there is no means of preparing such certificate except to trust to the memory of some person that heard the evidence.

8. PARTITION, § 69*—*scope of accounting*. In an action between heirs for a partition and an accounting, the complainant is not entitled to a credit for money loaned to defendants.

DIBELL, J., took no part in this decision.

Error to the Circuit Court of Iroquois county; the Hon. FRANK L. HOOPER and Hon. DOBRANCE DIBELL, Judges, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed July 31, 1914. Rehearing denied October 22, 1914.

O. F. MORGAN, MORRIS & MORRIS and HOLDOM, MANIERRE & PRATT, for plaintiffs in error.

A. F. GOODYEAR and ERNEST SEVERY, for defendants in error.

MR. PRESIDING JUSTICE CARNES delivered the opinion of the court.

John McDougall died intestate June 9, 1877, the owner of eighty acres of farm land, his homestead, incumbered by a mortgage debt of \$1,600 bearing ten per cent. interest. He left surviving his widow, Mary McDougall, and their five children, three girls and two boys, viz.: Elizabeth, Emma, Margaret and William J. and Charles G. There were some small debts and some personal property. There was no administration of his personal estate, and neither homestead nor dower was set off to the widow.

The family lived in the house on this land until about 1881, when the daughter Emma married and ceased to reside in the family, and the daughter Margaret died intestate leaving as her only heirs her mother and brothers and sisters. The daughter Elizabeth taught school for several years but made her home with the family until 1888, when she was

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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married. In 1890 the two sons and the mother removed from the premises. The mother died October 2, 1908, intestate, leaving her said surviving children as her only heirs. September 30, 1909, the daughter Emma, her husband joining, conveyed to the three surviving children, Elizabeth, William and Charles, her title in the land, and assigned to them her interest in the rents and profits past, present and future. October 7, 1909, the daughter Elizabeth (Severy) filed this bill for partition making defendants her brothers William and Charles, and asking also for an accounting as to the payment of the mortgage debt and of the rents, profits, taxes and improvements, alleging that she had contributed to the payment of said items or some of them. There were other parties to the suit not necessary to mention here. Numerous pleadings were filed including a cross-bill by William and Charles, but we will hereinafter designate the complainant in the original bill, defendant in error here, as complainant, and William and Charles McDougall as defendants.

June 21, 1910, a decree of partition was entered, on the pleadings without proof, finding the title to the premises in Elizabeth, Charles and William, each an undivided third; and by consent of the parties all questions concerning the accounting were by that decree reserved to be heard at some future time, and determined with the same force and effect as though included in the partition decree. November 8, 1910, the commissioners reported the premises not susceptible of division and reported their value at \$12,000. The report was approved by the court without objection, and January 14, 1911, William and Charles purchased the land for \$12,400 at the master's sale, and in due course received a deed therefor. Meantime, on August 6, 1910, the court entered a decree as to the accounting, on the pleadings and proof taken in open court, in which decree the court finds the issues for the com-

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plainant on the question of an accounting; finds the facts as to surviving widow and heirs, the residence of the family and the conveyance by the daughter Emma as above stated; finds that there has been rents and profits of the land and that William and Charles have received them all since the death of their father; that complainant has paid to William and Charles certain sums of money which she alleged was paid to contribute to the discharge of said mortgage and the expenses of the family; that William and Charles have paid taxes and for repairs, and claim to have paid certain sums for improvements; that the premises exceeded \$1,000 in value at the time of the death of the father; that dower and homestead were never assigned; that William and Charles should account to the complainant, Elizabeth, for the rents, profits and use and benefits of said premises from the date of the death of their father to the time of taking of the account; that Elizabeth is entitled to four-fifteenths from June 9, 1877 to January 10, 1881, and to twenty-eight-ninetieths from January 10, 1881 to October 2, 1908, and to one-third from October 2, 1908 to the time of taking said account, subject to proper deductions for rents and profits, to which the widow is entitled on account of her estate of homestead, to the value of \$1,000.

The court further finds that the defendants cannot be called upon to account, in this proceeding, for any personal property received which their father owned at the time of his death, and are not entitled to credit, in this accounting, for any of his debts which they have paid, except the mortgage indebtedness of \$1,600, for the reason that such matters are not germane to the issues. And further finds that the complainant is not entitled to an accounting for any money loaned by her to the defendants and which was not applied by defendants to payment of said mortgage indebtedness, taxes, insurance or other expenditures for ordinary

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repairs upon said land for which an accounting has been allowed.

An order of reference to the master for an accounting in accordance with the above findings followed, directing the parties to produce before him evidence in relation thereto, and directing the master to credit the defendants with the proportionate share of the complainant, of moneys expended for ordinary and reasonable repairs necessary for the preservation and use of the property,—the costs of such repairs; and to credit them with such share of improvements, if any, constructed out of their own funds, on the basis of the market value of the premises at the time of the sale without and with those improvements, provided if any such improvements were authorized by complainant, then the cost thereof shall be taken into account. There were other directions in the decree as to credits for payment by defendants of the mortgage indebtedness and other matters that will be hereafter mentioned, so far as they are questioned in the briefs.

The master proceeded to hear the parties on the accounting and, while he was so doing, William McDougall died testate February 4, 1911. By appropriate proceedings of record his brother Charles, as executor of his will, was substituted in his stead as a party to this action, and three minor children, alleged to be beneficiaries named in the will, were brought into court and a guardian *ad litem* appointed for them, who answered and actively represented them thereafter. We do not find from the abstract of record what interest these minors received under the will.

The master stated the account and prepared his report finding rents and profits received and disbursements made by defendants, which he filed, with the evidence taken by him, January 20, 1912, making extended tabulated statements as to the matters dealt with and concluding with the summary:

“Amount rent, issues and profits due complainant\$4,980.25

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Amount interest, taxes, mortgage, repairs,
improvements, etc., due defendants from
complainant 3,134.93

Balance due complainant from defendants. \$1,845.32''

Before filing his report the master submitted it to the parties, and Charles G. McDougall in his own right, and as executor of the estate of his brother, presented twelve objections which the guardian *ad litem* copied and also presented in behalf of the minors. The master heard and overruled these objections. They were allowed to stand as exceptions, and so far, at least, as the adults are concerned presented the questions of fact, and the only questions of fact, that the court was required to pass upon in reviewing the master's report.

In stating the account the master, as directed in the decree, divided the time into periods, found the value of the land at those different times and deducted \$1,000, the homestead estate value, from the value of the land to ascertain the balance on which the heirs were entitled to rentals. The first five objections are each solely on the ground that the fair value of the land during those five periods was not so much as found by the master, but was \$1,200, \$1,400, \$1,500, \$1,600 and \$1,800 respectively, and that deducting the \$1,000 estate of homestead the master's finding of yearly rentals was because of his overvaluation of the land excessive. The sixth objection charges erroneous computation of interest. The seventh charges that defendants are entitled to an allowance against the complainant for a full third of the amount of all payments made by the defendants on the mortgage debt and for repairs. (The master had allowed credits in proportion to the ownership in the land at the time the payments were made.) The eighth objects that the master did not act on that provision of the decree providing for valuing improvements made by defendants on the basis of increased value of the land. The ninth objects that the master did not charge complainant a full third

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of moneys paid for taxes and insurance. The tenth is a general objection that the report is vague, insufficient and incomplete. The eleventh charges that the master combined statements of improvements and repairs so that it is impossible to separate them and ascertain what the premises were worth with and without the improvements. The twelfth objection is general, that the amount found due is unjust and not warranted. The trial court on a hearing overruled the exceptions and entered a decree March 25, 1912, as recommended by the master, computing the interest on the amount found due from the defendants to the time of entering the decree. The defendant Charles McDougall, in his own right and as executor, sued out a writ of error in the Supreme Court. There being no freehold involved the cause was transferred to this court. *Severy v. McDougall*, 259 Ill. 272. Defendants employed other counsel and by leave of this court additional briefs have been filed in which alleged errors of the trial court in affirming the master's report are argued without much reference to the questions presented by the objections and exceptions to that report. It is hardly necessary to cite authorities that a party will not be heard on review to make objections to the master's report which he did not bring to the attention of the trial court. *Singer, Nimick & Co. v. Steel*, 125 Ill. 426; and *Barney v. Board Comr's of Lincoln Park*, 203 Ill. 397, are among the cases so holding.

The issues presented by objections and exceptions were: First. That the master at the different periods of years in which he stated the account of the rents chargeable to the defendants should have placed a lower value than he did on the land and should have deducted the \$1,000 homestead estate value from that in getting a proportion of the entire rents to be charged to the defendants. We are of the opinion that the evidence sustains the master's valuation. The next objection, that the master erred in computing interest

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on the basis assumed by him, we assume means only an error in figures. No complaint of any such error is made here. It is urged here that interest at ten per cent. should have been computed on the mortgage debt paid by the defendants. The decree did not so provide and we are of the opinion that they, as tenants in common, with entire charge and control of the premises, receiving the rents and profits thereof, were only entitled to legal interest on amounts so paid by them. The other objections all go to the supposed errors of the master in not charging the complainant a full one-third part of the aggregate amount found by the master to have been expended by defendants in repairs, improvements, etc., and in disregarding the directions in the decree as to difference in market value in the premises with and without improvements. We see no error in the master's method of computation. After the father's death complainant owned one-fifth of the land subject to the homestead right of her mother; afterwards, on the death of her sister, she owned a larger fraction; afterwards her mother died and her fractional interest was freed from the homestead deduction of \$1,000; and then, just before this suit was begun, the interest of the other sister, not only in the land but also in the result of the accounting, was acquired by complainant and defendants (one-third each). We see no error in charging and crediting during each period according to the interest owned by the respective parties at the time. It is true that the master, had the proof required it, should have allowed defendants for certain improvements on the basis of the difference in the market value of the land because of such improvements, and the objections cover that question; but we are of the opinion that the master did not have before him any evidence on which he could intelligently base such an estimate, and that he therefore did not err in basing the account on the cost of improvements. There was a drainage ditch

constructed in the neighborhood during the period in question. These lands were within the drainage district and no doubt much appreciated in market value by reason of the drainage improvement making it practical to drain the land, and improving the neighborhood in which it was located. There was some evidence that the lands were nearly valueless without the improvements and very valuable with them; but it is all based on a theory that would make a building lot in a city of no value whatever before a building was placed upon it, on the ground that it was earning nothing. In such case, in the absence of any reasonable, reliable evidence as to the market value with and without improvements, justice is more nearly reached by allowing the tenant in common who erects a building, what he expended in so doing, and the master attempted to proceed on that plan. The defendants refused to state any account, and conclusions were reached in some instances without the most satisfactory basis, but we do not find that the master could reach a more satisfactory or equitable result on a rehearing.

Counsel in their argument state as objections to the master's report:

1. That it was error to allow complainant full rental without some deduction on account of the occupation by the complainant and her sister of the premises for a time.

2. That it was error for the master to charge the defendants rental on the basis of value thereof because there was no showing that defendants excluded the complainant from joint occupation of the premises with them, and under such circumstances only rentals actually received can be recovered.

3. Under circumstances last mentioned it was error for the master to charge defendants with interest on the rents.

4. The court erred in refusing to permit the defendants to set off against the rent the expenses in connec-

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tion with the care and maintenance of the mother of the parties. This objection goes also to the decree for accounting.

5. The master's report is based in part on testimony of complainant as to her consenting to improvements and other matters not in denial of the testimony of the deceased defendant. It is not pointed out and we do not discover where any of these matters were brought to the attention of the trial court. It is also objected that the master in crediting the defendants with improvements, repairs, etc., deducted from the entire value of the estate \$1,000 as the homestead value, and that the widow's homestead estate was not of the value of \$1,000 but should have been ascertained by computing the value of her life estate in \$1,000. Nothing was specifically charged to the homestead estate in the accounting. The defendants were relieved by the method pursued from accounting to complainant for profits derived year by year from that fractional part of the estate represented by \$1,000. It was fair, so far as we can see, to charge them on the same basis for taxes, repairs and other current expenses; but in so far as they fail to receive credit for any permanent improvement by reason of deducting \$1,000 instead of some smaller sum as the value of the homestead that should contribute to the improvement, there may have been error. It is difficult to tell with any degree of certainty what would be the result of a recomputation treating the homestead, in so far as it should contribute to permanent improvements, of less value than \$1,000; and we do not find that this question was brought to the attention of the trial court. In the objections and exceptions filed the only reference to the value of the homestead is in the statement that it should have been taken by the master as \$1,000 in the computation referred to in the objections.

It is urged that the matter did not allow defendants credit for improvements resulting from their labor on

the premises, but confined their allowance to expenditures of money made by them for that purpose. The account as stated did make some allowance to the defendants for their labor in making improvements, and even if the master erred in that respect neither his attention nor the attention of the court was called to the matter by objection or exception.

It is suggested that it is the duty of a court of chancery to protect the rights of infants in suits there pending, and we are not unmindful of the law that imposes that duty on the court. It is true that the court should see that the guardian *ad litem* performs his duty and that no substantial interest of minors should be lost by the guardian's failure to do so. The rule no doubt is that the court on its own motion will protect the rights of infants where they are manifestly entitled to some relief, although their guardian *ad litem* may neglect to claim it in their behalf. *Mason v. Truitt*, 257 Ill. 18. But in this case we do not know what the interest of the infants was; we simply know that they are beneficiaries named in the will of one of the defendants who died pending the accounting in this case; they may be entitled to the entire interest of the testator in the property in suit here, or it may all be required to pay his debts; the title may have been devised to them or to the executor in trust for them. Whatever their rights are they are of the same nature as those of Charles G. McDougall personally, and he, with his personal interest as an individual coinciding with his interest as executor, appeared by counsel and acted for the infants. The court also appointed a guardian *ad litem* and allowed him a fee. We assume he was a competent lawyer. It hardly seems reasonable, with the property of an infant so represented and so protected, that a chancellor should be charged with a duty to investigate an extended report of his master, covering many years and many items, for errors that could not be discovered and pointed out by the solic-

itors of the defendants or the guardian *ad litem*. Yet, if some error of a substantial nature did so occur that would result in sacrificing the interest of the minors, it is probably our duty to reverse and remand the case, to the end that the infants' interests may be protected. We have examined this record with the view to determine, not only whether the chancellor erred in passing on matters presented to him, but also to ascertain if in the matter of the accounting there was such substantial error as should require this court to remand the case to protect the interests of the infant defendants, and we are of the opinion that substantial justice has been done in the accounting and that it is not in their interest that the cost and expense of another trial be incurred.

The principal objection urged to the decree for partition is that it was entered on the pleadings, and under the allegations on which it is based it should have provided that the part of the premises on which defendants had made improvements be set off to them, that they might in that way receive the benefit of their improvements in case of actual partition of the land. The decree did provide that the interests of the defendants might be set off to them jointly, so that had the commissioners found it practicable they could have set off to the defendants two-thirds of the land and to the complainant one-third. They reported that they could not so divide it, and we judge from the record that the land was incapable of actual division on any reasonable theory of the case. It is also said it was error to enter the decree of partition and proceed thereunder before the decree for accounting and proceedings thereunder, by which the interests of the parties in the improvements would be ascertained. The order of proceeding complained of did render it difficult, if not impossible, to make any proper decree of partition that should take into account the improvements, in directions as to the division of the land. But this order of proceeding

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was expressly consented to by the defendants in their agreeing to defer the matter of accounting for a future hearing and decree. They did not object to the report of commissioners, and acquiesced in the decree of sale entered thereon and purchased the premises at the sale made thereunder. We do not regard them as now entitled to question the decree in that respect, and do not see that they have been in anyway harmed by the omission of such provision in the decree.

As to the decree on accounting: Nearly two years after it was rendered, and after the master had taken and stated an account in accordance with its terms, and the court had entered its decree based on that account, but at the same term at which the last mentioned decree was entered, the defendant Charles G. McDougall, in his own right and as executor, on June 8, 1912, moved the court for an order granting leave, and extending the time to July 1, 1912, to present a certificate of evidence on which the decree on accounting was entered. This motion was denied, and that action of the court is urged as substantial error. The decree overruling exceptions to the master's report and ordering distribution in accordance therewith was rendered by a different judge of the circuit from the one that entered the decree on accounting. It seems unreasonable and unjust that defendants should apparently acquiesce in the decree on accounting, and the principles there announced, and participate in all proceedings thereunder until a final result was reached on computations based on the directions of that decree to the master, and then for the first time raise the question whether the evidence heard by the court, in the proceedings resulting in that decree, supported the findings of fact incorporated therein. It is familiar doctrine that in cases at law the bill of exceptions must be taken at the term at which the rulings excepted to were made, or within such time as the court may at that term have granted for that purpose; and this ap-

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plies whether the ruling excepted to is a final and appealable order or not. *Village of Franklin Park v. Franklin*, 228 Ill. 591; *Finch & Co. v. Zenith Furnace Co.*, 245 Ill. 586; *People v. Strauch*, 247 Ill. 220. No reason occurs to us why this rule should not apply to the filing of a certificate of evidence; but, be that as it may, it does not appear that any certificate of evidence was prepared or offered, or that the evidence was taken in shorthand. It may be that the court in denying this motion knew that there was no means of preparing a certificate of evidence except to trust to the memory of some person that heard it, and that he could not pass on such certificate aided by anything but his personal recollection as to what occurred at a prior term. If such was the condition of affairs the motion was properly denied. *Saratoga European Hotel & Restaurant Co. v. Mossler*, 76 Ill. App. 688, and authorities there cited. Presumptions must be indulged in favor of rather than against the action of the court. We are also inclined to hold, under the authority of *DeGrasse v. Gossard Co.*, 236 Ill. 73, and the cases there cited and reviewed, that the decree was final in the sense that an appeal might have been then taken; and it is only on the claim that it was not, that counsel urge error in refusing leave to file a certificate of evidence.

Having determined that the court did not err in refusing leave to file a certificate of evidence, the findings of fact in the decree on accounting cannot be questioned, as indeed they could not now be questioned here if the court had erred in so ruling. The only relief we could give would be to remand the case that an effort might be made to get a certificate of evidence in the record that would enable some court in the future to determine whether the findings were warranted. The findings in the decree are conclusive on many of the questions argued here, as, for instance, the right of the defendants to credit for support of their mother.

That was an issue presented by the pleadings, as well as an issue whether there was an agreement between the defendants and the other interested parties that they should not be charged rent in consideration of their keeping up a home for the family. Failing to get a provision in the decree in their favor on these questions, it is to be assumed no evidence was furnished to support their contentions as to those matters.

The defendant in error has assigned cross-errors: That the court erred in not allowing her credit for the payment of a part of the mortgage incumbrance; in not allowing her credit for money paid to the defendants; that the court erred in fixing rental values and costs of improvements. The master did not allow her credit for moneys of hers that went into the defendants' hands, on the theory that it was a loan and could not be taken into account in this proceeding. The evidence warranted that conclusion, and we are not disposed to disturb the findings of the master as to the other items in question. It was the somewhat familiar case of the death of the father owning a little personal property and a small farm and owning a considerable debt. The family all took hold together to earn a living and pay off the debts, with no account kept of the amount each contributed to that purpose. The mother kept house when she was able and when she was not she was aided by other members of the family. The boys did their best on the farm, and in this case they prospered exceedingly, paid the debts, improved the land, made money and the brothers purchased other lands for themselves. In such a case it is impossible to arrive at accurate results. No two competent masters in chancery would place the same valuation on each of the numerous items that they were required to find from the evidence. The master in this case may have got some items too high and some too low, but we are satisfied that he has reached as accurate a result

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and as equitable a conclusion as is possible in such a case.

The decrees are affirmed.

Affirmed.

MR. JUSTICE DIBELL took no part in this decision.

**Patrick J. Ryan et al., Appellees, v. Michael C. Hayes,
Appellant.**

Gen. No. 5,851. (Not to be reported in full.)

Appeal from the Circuit Court of Lake county; the Hon. CHARLES H. DONNELLY, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed July 31, 1914. Rehearing denied October 8, 1914. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Bill by Patrick J. Ryan and Catherine Burns, as administratrix of the estate of J. Frank Tyrrell, deceased, against Michael C. Hayes and others to foreclose a trust deed which on its face secured a note for \$6,000 and two notes for \$12,500 each. The bill alleged that the \$6,000 note was the property of plaintiffs and that the two other notes were the property of other party defendants. Defendant Hayes answered admitting the execution of the notes and trust deed but denying any present indebtedness therein, and averring that there was no consideration for said notes except \$3,000 received by him on said \$6,000 note. He filed a cross-bill alleging usury and fraud. Issues were presented by the pleadings and the cause submitted to a master in chancery. The master made a report recommending a decree dismissing the cross-bill and granting the relief prayed in the original bill. From a decree entered on the finding with certain modifications, defendant Hayes appeals.

Ryan v. Hayes, 190 Ill. App. 208.

ALANSON C. NOBLE and QUIN O'BRIEN, for appellant.

PHILIP S. BROWN, WILLIAM F. WEISS and GEORGE W. FIELD, for appellees.

MR. PRESIDING JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. JUDGMENT, § 471*—*when not res adjudicata as between co-parties.* A decree in a former suit is not *res adjudicata* as between codefendants where under the pleadings in such suit such rights could not be finally adjudicated.

2. ATTORNEY AND CLIENT, § 91*—*application of law protecting client in dealings with attorney.* The law protecting a client in his dealings with his attorneys concerning property which is the subject-matter of the litigation has much less application to cases in which the questions are not concerning matters in which the attorneys have superior knowledge and in which the client naturally trusts his lawyers, but are concerning business propositions of which the client knows more than his attorneys and in which he would naturally exercise his own judgment.

3. ATTORNEY AND CLIENT, § 92*—*when contract with client as to attorneys' fees are unfair.* Evidence held sufficient to sustain a finding that attorneys in dealing with their client acted in good faith in contracting for attorneys' fees which appeared excessive for the services performed, it appearing that the compensation was not to be payable in money but of property of doubtful value.

4. APPEAL AND ERROR, § 1512*—*when irregular acts of court harmless.* Action of chancellor after overruling exceptions to the master's report in changing on his own motion, some of the findings and striking out some of the allegations in the pleadings, held irregular but not prejudicial.

WHITNEY, J., took no part in this decision.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Kelly v. Hakes, 190 Ill. App. 210.

Bettie D. Kelly, Appellant, v. Stary M. Hakes, Appellee.

Gen. No. 5,922. (Not to be reported in full.)

Appeal from the County Court of Woodford county; the Hon. ARTHUR C. FORT, Judge, presiding. Heard in this court at the April term, 1914. Affirmed with finding of facts. Opinion filed July 31, 1914. Rehearing denied October 8, 1914.

Statement of the Case.

Replevin by Bettie D. Kelly against Stary M. Hakes to recover possession of a mare and two colts. Upon a trial without a jury the court found that plaintiff was entitled to possession of the mare and the defendant entitled to the possession of the colts. The court entered judgment on the findings apportioning the costs between plaintiff and defendant and ordered a writ of *retorno habendo* for the return of the colts. To reverse the judgment, plaintiff appeals, and the defendant assigns cross-errors that the court erred in awarding possession of the mare to plaintiff and in apportioning the costs, and in taxing any costs against defendant.

JAMES L. HICKS, for appellant.

ORMAN RIDGELY, for appellee.

MR. PRESIDING JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. REPLEVIN, § 124*—*sufficiency of evidence*. In replevin to recover possession of a mare and two colts, evidence *held* sufficient to sustain a finding that each of the parties owned a half interest in the colts.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Klein v. Stubbe, 190 Ill. App. 211.

2. REPLEVIN, § 17*—*right of action as between tenants in common.* A part owner of a chattel cannot maintain replevin therefor as against his co-owner in possession.

3. REPLEVIN, § 163*—*costs.* The general rule that the prevailing party is entitled to costs is not applicable in replevin cases where the plaintiff fails to recover all the property replevied.

4. APPEAL AND ERROR, § 1032*—*questions not raised for review.* The manner of apportioning costs is not presented for review where the only argument on appeal goes to the right to make an apportionment.

Henry A. Klein, Appellee, v. Fred C. Stubbe, Appellant.

Gen. No. 5,916.

1. CHATTEL MORTGAGES, § 7*—*transactions in nature of.* If a bill of sale and contract are in the nature of a chattel mortgage they will be so considered.

2. EVIDENCE, § 339*—*when parol evidence rule inapplicable.* The rule excluding parol evidence to vary a written instrument has no application where a stranger to the instrument seeks to show that it does not express the full and true character of a transaction; and where a stranger is thus free to vary or contradict a written instrument, his adversary, although a party to it, is free to do likewise.

3. CHATTEL MORTGAGES, § 202*—*when mortgagee not liable for debts of mortgagor.* Where a chattel mortgagee, holding a bill of sale and contract in the nature of a mortgage, takes over a mortgagor's property and business, he does not become liable for the mortgagor's debts, although the mortgage may have been ineffective, because of lack of possession, as against a judgment creditor of the mortgagor.

Appeal from the City Court of Sterling; the Hon. HENRY C. WARD, Judge, presiding. Heard in this court at the April term, 1914. Reversed with finding of facts. Opinion filed July 31, 1914. Rehearing denied October 8, 1914.

J. J. LUDENS, for appellant.

CHARLES H. WOODBURN, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Klein v. Stubbe, 190 Ill. App. 211.

MR. JUSTICE DIBELL delivered the opinion of the court.

On September 26, 1912, an agent of Henry A. Klein sold a quantity of liquor to John Mammen, who was at that time conducting a saloon at No. 113 East Third street, in the city of Sterling, Illinois. Part of this liquor consisted of a barrel of whisky, which was to be paid for in in four months. When the agent called to collect for the whisky at the expiration of the period of four months, Fred C. Stubbe was running the saloon, and upon Stubbe's refusal to pay for the whisky, Klein brought suit against him therefor before a justice of the peace and recovered a judgment, from which Stubbe appealed to the City Court of Sterling. There the cause was tried without a jury and Klein again had judgment against Stubbe, from which defendant below appeals.

It appears from the evidence that in August, 1912, prior to the sale of this whisky, John Mammen borrowed about twenty-eight hundred dollars from the Pabst Brewing Company and obtained the signature of Stubbe as surety on his note for that amount. To secure Stubbe, appellant here, in that transaction, Mammen gave a bill of sale to Stubbe of the saloon fixtures and everything connected with the business, and then, as a part of the same transaction, entered into a contract with appellant by the terms of which Mammen was to conduct the business for appellant, pay all bills and retain any balance there might be as his own profits. The saloon license was, by petition of Mammen, transferred by the city council of Sterling to Stubbe and remained in his name until February, 1913, when appellant sold the business to a third party and the license was transferred again. The evidence further shows that this bill of sale and contract were, in fact, in the nature of a chattel mortgage. Appellant never took possession of the business or chattels mentioned in the bill of sale until January, 1913, when Mammen left town and turned everything over to ap-

pellant, who then for the first time took charge of the business and conducted it until it was sold again a month later.

Appellee contends that parol evidence cannot be heard to show that the bill of sale involved herein was executed with any other intention than appeared on the face of the instrument, and the decision of the court below seems to have been based upon that theory. This may be the law applicable to actions between the parties to the instrument, but it has no application in actions between a party to the instrument and a third person. The rule excluding parol evidence to vary or contradict a written instrument has no application in controversies between a party to the instrument on the one hand and a stranger to it on the other, for the stranger, not having assented to the contract, is not bound by it and is therefore at liberty, where his rights are concerned, to show that the written instrument does not express the full and true character of the transaction; and where the stranger to the instrument is thus free to vary or contradict it by parol evidence, his adversary, although a party to the instrument, must be equally free to do so. 17 Cyc. 749. In the case at bar, appellee, not being a party to the bill of sale and contract, could have introduced oral evidence to vary or contradict those written instruments, and therefore appellant, although a party to both of said instruments, must be given the same privilege.

In this state of the proof we find Mammen owning, controlling and operating this saloon, merely subject to the incumbrance to appellant; we find the agent of appellee selling goods to Mammen, in the belief that Mammen was operating the saloon, as he was, doing business with and giving credit to Mammen and looking to Mammen alone for his pay; and we find appellee in that attitude towards Mammen until February, 1913, when his agent ascertained that appellant had come into possession of the premises and business. The fact

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that appellant was so in possession of the business in February, 1913, cannot make him responsible for the debts of Mammen, contracted in September, 1912, when Mammen was operating the saloon and owned the business. There is no evidence of any fraud practiced upon appellee or his agent either by Mammen or by appellant. Under the undisputed evidence, Mammen was the owner of the saloon in September, 1912, just as appellee supposed him to be, and appellant was merely a chattel mortgagee out of possession, holding a bill of sale of certain property merely as security. The act of appellant in taking over the property and business in January, 1913, could not make him liable for the former debts of Mammen. It is entirely possible that his chattel mortgage was invalid because of his lack of possession, and that, had appellee sued Mammen and obtained judgment against him, he could have made that judgment out of the property named and described in the bill of sale. But those questions are not raised in this proceeding.

The judgment is reversed.

Reversed with finding of facts.

Finding of facts to be incorporated in the judgment. We find that appellant is not liable to appellee for the purchase of the merchandise for which appellee brought this suit.

Pearl Berry, Appellee, v. Edwin W. Berry, Appellant.**Gen. No. 5,936. (Not to be reported in full.)**

Appeal from the Circuit Court of Lake county; the Hon. CHARLES WHITNEY, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed July 31, 1914. Rehearing denied October 8, 1914.

Statement of the Case.

Action by Pearl Berry against Edwin W. Berry for separate maintenance. From a decree for separate maintenance and for solicitors' fees and costs of suit and custody of a child three years of age, defendant appeals.

Upon the question of issuing a writ of *ne exeat* in a divorce case to secure the payment of alimony, the court cited the following authorities: *Mac Kenzie v. Mac Kenzie*, 141 Ill. App. 126; *Denton v. Denton*, 1 Johns ch. (N. Y.) 364, 441, and cases cited.

HEYDECKER & JORGENSEN and E. V. ORVIS, for appellant.

H. C. COULSON and R. F. FOWLER, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

1. HUSBAND AND WIFE, § 267*—*when decree for separate maintenance will not be disturbed.* Where a decree for separate maintenance is entered upon conflicting evidence, it will not be disturbed on review, if there is sufficient evidence to support complainant's contention.

2. HUSBAND AND WIFE, § 249*—*solicitors' fees not excessive.* An allowance of fifty dollars for solicitors' fees in an action for separate maintenance is *held* not to be excessive, there being no question as to the court's right to make such an allowance.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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3. *NE EXEAT*, § 8*—*when objection to power of court to issue not preserved for review.* Where an appeal bond does not recite an appeal from a distinct order for a writ of *ne exeat*, which was not questioned in the trial court, the question whether the issuance of such a writ was beyond the powers of the court because not within the letter of the statute was not saved for review.

WHITNEY, J., took no part in this decision.

William Leonard et al., Plaintiffs in Error, v. Joseph Garland et al., Defendants in Error.

Gen. No. 5,877.

1. *DRAINAGE*, § 47*—*when bill will not lie to restrain acts of commissioners.* In an action to restrain a board of commissioners for a drainage district from making payment on a contract for drainage tile, and to restrain them from using in the improvements any tile not in accordance with the contract, *held* the bill was properly dismissed, as the court was without jurisdiction to review the exercise of the board's discretion in passing upon the work accepted and in settling for the same in the absence of any showing of fraud, the evidence tending to indicate that the question was one on which intelligent men, charged as were the commissioners, with the duty of passing upon the work, might honestly differ.

2. *MUNICIPAL CORPORATIONS*, § 250*—*discretionary power of board of public works.* Board of public works having charge and superintendence of public improvements, given by law a discretion in letting contracts and in passing upon the character of the work and in settling for the same, are not within the control of a court in the exercise of such discretion so that a court will not hear proofs and attempt to determine whether the discretion is wisely exercised or not in a given case.

3. *DRAINAGE*, § 43*—*powers of commissioners.* The law giving a board of commissioners for a drainage district power to contract for and pass upon the character of the work and to settle for the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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same necessarily requires that it exercise judgment and discretion in determining whether the work is done according to contract, as well as in letting the contract; and in supervising and settling for work, the commissioners do not act merely as ministerial officers.

4. DRAINAGE, § 47*—*power of commissioners to settle for improvement.* In the absence of proof of fraud it is immaterial whether a board of commissioners of a drainage district shows intelligent care and attention in passing upon and settling for drainage improvements, although there may be cases where the intelligence is so great that fraud will be presumed, or where the work accepted is so different from that contracted for as to make an improvement of an entirely different character and description, such as to require relief in equity.

Error to the Circuit Court of La Salle county; the Hon. EDGAR ELDRIDGE, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed October 13, 1914.

BUTTERS & ARMSTRONG, for plaintiffs in error.

C. S. CULLEN, D. L. DONOVAN and JOHN GARLAND, for defendants in error; B. F. LINCOLN, of counsel.

MR. PRESIDING JUSTICE CARNES delivered the opinion of the court.

Plaintiffs in error, William Leonard and others, hereinafter called complainants, are owners of land in a drainage district organized under our Farm Drainage Act. Defendants in error, hereinafter called defendants, are the commissioners of that district, and a company that furnished and laid tile in the drainage ditch under a contract with the commissioners. This suit began by a bill for injunction filed by the complainants in which it was averred that the commissioners had fraudulently conspired with the company to pay it more than four thousand dollars of the public funds for worthless tile that the company was installing in the ditch in violation of the contract under which the work was done, and praying that the commissioners be restrained from making payments on the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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contract, and that the defendants be restrained from using in the improvement any tile not in accordance with the contract. The defendants answered the bill and the chancellor on a hearing on the pleadings and affidavits denied a temporary injunction and dismissed the bill. The complainants prosecuted an appeal to this court where the decree was affirmed, and then a writ of error to the Supreme Court where the judgment of this court and the decree of the Circuit Court were reversed and the cause remanded to the Circuit Court. The case is reported under the title of *Leonard v. Garland*, in 157 Ill. App. 355, and reversed in 252 Ill. 300, and the opinions may be read for a more complete statement of the matters involved.

The case was reinstated in the Circuit Court and tried on the pleadings and evidence of witnesses heard in open court, resulting in a decree dismissing the bill for want of equity, and the case is brought here by writ of error.

Much oral testimony was heard by the chancellor, in large part directed to the question whether the tile furnished was in accordance with the specifications of the contract. There was no proof of any corrupt agreement between the commissioners and the company, or that the commissioners had made or attempted to make any personal profit in the transaction, but there was a sharp conflict of evidence on the question whether the tile was of the kind and character specified; and had it been the duty of the court to weigh that evidence and control the judgment and discretion of the commissioners on that question, we would deem it necessary to fully discuss the proofs and the weight which, in our judgment, should be given to the various items of evidence. But under our view of the law it is sufficient to say that there was much apparently credible evidence supporting each contention, and therefore we presume the question was one

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on which intelligent men charged, as were these commissioners, with the duty of passing upon the work, might honestly differ.

There is no contention that the commissioners were not authorized to contract and settle with the company for the tile, and we think it clear that the law giving them that power and imposing upon them that duty necessarily required them to exercise judgment and discretion in determining whether the work was done according to the contract, as well as in letting the contract; though complainants contend here that after the contract was let the commissioners were acting as ministerial officers in supervising and settling for the work, and that a case is made by showing to the satisfaction of the court that they accepted tile inferior to that contracted for without further showing a fraudulent intent, and *Gage v. Springer*, 211 Ill. 200, is cited in support of that contention. We think that case, when read with others hereinafter noted, is authority only that public officers charged with duties similar to those under consideration here are subject to the control of courts if they attempt to substitute, as they did in that case, "an improvement of an entirely different character and description" from the one contracted for. The facts of this case do not bring it within that rule.

It has long been settled law in this State that boards of public works having charge and superintendence of public improvements, and given by law a discretion in letting contracts and passing upon the character of the work, will not be controlled by a court in the exercise of that discretion, and that courts will not hear proofs and attempt to determine whether the discretion is wisely exercised or not. *Kelly v. City of Chicago*, 62 Ill. 279, is an early case where the doctrine was applied to the letting of a contract, and that case has been followed in later cases involving the same question, and complainants' counsel say that the rule is limited to

cases of discretion exercised in letting a contract. But in *Fitzgerald v. Harms*, 92 Ill. 372, the question arose as to the power of the court to interfere with the action of a board of commissioners in settling for work done by a contractor in erecting a courthouse, and the court said the board was intrusted with power to examine and settle all accounts against the county, and that the court would not stop to inquire whether the claim of the contractor was meritorious or not; that commissioners clothed by the law with certain powers, as long as they keep within their jurisdiction although they may err in judgment, cannot be interfered with by the courts unless fraud be shown; that the only remedy is in the hands of the taxpayers in a judicious use of the ballot at the polls to defeat incompetent men. This case is cited and followed in *County of Coles v. Goehring*, 209 Ill. 142. In the opinion there is found a very full discussion of the powers and duties of courts in the supervision of public officers in the discharge of their duties in contracting for and supervising public improvements; and in *People v. Kent*, 160 Ill. 655, where the court found neither favoritism nor fraud as a matter of fact, and said none is to be inferred as a matter of law, it was held that in the absence of fraud courts have no right to interfere with the exercise of official judgment and discretion vested in a public officer. To the same effect is *Johnson v. Sanitary Dist. of Chicago*, 163 Ill. 285.

In the absence of proof of fraud it is immaterial whether the record shows want of intelligent care and attention on the part of the commissioners or not. Cases may be imagined where the negligence is so great that fraud would be presumed, or where the work accepted is so different from that contracted for as to make an improvement of an entirely different character and description, and in such cases a court of equity might grant relief. But on this record the default of the commissioners, if they were negligent or

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erred in judgment, is beyond the power of a court of equity to remedy.

The decree is affirmed.

Affirmed.

This case was considered and decided at the October term, 1913, and the preparation of the opinion has been delayed by the sickness and death of MR. PRESIDING JUSTICE WHITNEY, to whom the case had been assigned to write the opinion.

**Bank of Montreal, Appellant, v. Estate of Asa Griffin,
Deceased, Appellee.**

Gen. No. 5,973.

1. JUDGMENT, § 401*—*privity of*. Of two conflicting judgments obtained in courts of concurrent jurisdiction on the same claim by the same plaintiff against the same defendant, that which is later in point of time will prevail.

2. JUDGMENT, § 419*—*when dismissal of appeal to Circuit Court not an adjudication on merits*. A judgment dismissing an appeal from the Probate to the Circuit Court at the cost of appellant, either on his own motion or that of the court, at any time before or during the trial, does not have the effect of an adjudication on the merits.

3. APPEAL AND ERROR, § 783*—*necessity of court's signature to bill of exceptions*. A stenographer's statement added to a proposed bill of exceptions, to the effect that the court found the issues against a claimant and dismissed an appeal from the Probate Court, is not entitled to any weight as a finding or judgment of the court on the merits, if the proposed bill of exceptions was not signed.

4. JUDGMENT, § 419*—*when dismissal of appeal to Circuit Court not res adjudicata*. Where upon appeal from an order of the Probate Court to pay a judgment rendered in the Appellate Court, the petition was denied in the Circuit Court upon the ground that a suit covering the same subject-matter pending in the Circuit Court resulted in a dismissal, *held* that the dismissal of the suit in the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Circuit Court did not constitute an adjudication of the claim, and that a judgment should be entered to direct the administrator to pay the judgment of the Appellate Court within sixty days or to make application for the sale of real estate to pay debts as prayed in the petition, to satisfy the judgment in the Appellate Court, which was last in point of time.

Appeal from the Circuit Court of La Salle county; the Hon. SAMUEL C. STOUGH, Judge, presiding. Heard in this court at the April term, 1914. Reversed and remanded with directions. Opinion filed October 13, 1914.

ROBERT F. PETTIBONE, JOHN S. GOODWIN and McDUGALL & CHAPMAN, for appellant.

STEAD, WOODWARD & HIBBS and BROWNE & WILEY, for appellee.

MR. PRESIDING JUSTICE CARNES delivered the opinion of the court.

Asa Griffin died a resident of La Salle county July 19, 1905, and his widow, Mary L. Griffin, was by the Probate Court of that county appointed administratrix of his estate, and qualified as such. At the time of his death there was pending in the Circuit Court of Cook county a suit in assumpsit, brought against him by the Bank of Montreal, the appellant, on seven promissory notes; and after his death suit was brought by the Bank in the same court against Mary L. Griffin, his administratrix, on three promissory notes. These suits were consolidated and proceeded to a judgment for the defendant in the Circuit Court, and on appeal to a judgment in the Appellate Court of the First District, rendered May 2, 1910, in favor of appellant for \$19,295.27, to be paid in due course of administration. *Bank of Montreal v. Griffin*, 154 Ill. App. 616. The detail of the litigation resulting in that judgment is now of little importance, but it may be learned by reading the opinion in that case. July 12, 1910, appellant filed a peti-

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tion in the Probate Court of La Salle county, praying that the administratrix be ordered to show cause why she should not pay said judgment, and April 5, 1911, there was a hearing on the petition and an order directing the administratrix to pay the judgment within sixty days or make application to sell real estate for the payment of debts. Appellee perfected an appeal from that order to the Circuit Court of La Salle county, April 24, 1911, and that court on a hearing November 18, 1913, denied the petition, from which this appeal is prosecuted.

Appellee in support of the judgment relies on the following facts: On November 28, 1905, appellant filed in the Probate Court of La Salle county a claim against the estate on all of these ten notes. February 9, 1906, the Probate Court, on a hearing, entered an order disallowing the claim. Appellant perfected an appeal to the Circuit Court of La Salle county February 19, 1906. With both suits pending in the same court between the same parties, involving the same subject-matter, there was a trial May 9, 1912, of the appeal from the order of the Probate Court disallowing the claim. The record shows that the parties appeared, waived a jury and submitted the cause to the court, and the court entered an order, which as abstracted reads: "Jury waived by agreement of parties, cause submitted to the court for trial and the court having heard the proofs submitted herein and on consideration thereof it is ordered that the appeal herein be and the same is hereby dismissed.

"It is therefore considered and ordered by the court that the defendant do have and recover of and from the plaintiff, Bank of Montreal, her costs and charges and have execution therefor."

On the trial of the cause at bar appellant offered in evidence the judgment of the Appellate Court and the opinion of that court, the record of the case in the Cook County Circuit Court and the petition in and

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the order of the Probate Court and rested its case. Appellee then offered in evidence records showing the action of the Probate Court in disallowing the claim and the pendency of that suit in the Circuit Court on appeal, and showed that the subject-matter of the litigation was in each suit the same ten promissory notes; and further offered in evidence a report of the official stenographer of the proceedings in that case which had been prepared as a bill of exceptions and presented to the trial judge, but not signed by him or filed in the case, but the stenographer testified in this case that it was a true statement of what took place at the trial. It appeared from that writing that appellee appeared by counsel on the trial of that case and suggested to the court that appellant had a valid judgment for the ten notes in question in the Appellate Court of the First District, and that it ought to dismiss the appeal and ought not to have judgment in two places for the same cause of action, but that appellant, appearing by counsel, insisted on a hearing and the court proceeded to hear evidence in the case. Appelsuggested to the court that appellant had a valid judgment in the Appellate Court and a certified copy of the order of the Probate Court of April 5, 1911, with some other records of the Probate Court. Then followed a discussion in which the court stated to appellant that it had its order, appealed from, in the Probate Court and had a judgment in Cook county; that if it succeeded in the case on trial it would be obtaining two orders or judgments for the collection of the same debt; that with a judgment in the Appellate Court of the First District and an order of the Probate Court of La Salle county enforcing that judgment pending in the Circuit Court on appeal, he would dismiss the appeal unless they wanted to try the other appeal. The court then held, at the instance of appellant, as a matter of law: "The judgment of the Appellate Court of Illinois for the First District is *res adjudicata* as to

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the validity and amount of the claim of the Bank of Montreal against said estate." It is true that there is added to the proposed bill of exceptions that "the court found the issues on said claim to be against the claimant and dismissed the appeal;" but this is merely the statement of the reporter and should receive no weight as a finding or judgment of the court, since said proposed bill of exceptions was not signed.

The theory of appellee is that appellant, by its action in the case above recited, submitted to the Circuit Court the whole controversy, including the force and effect of its Cook county judgment as a claim against the estate, and that the judgment of the Circuit Court dismissing its appeal was an adjudication of that claim; and whatever motive the court may have had in dismissing the appeal, its judgment determined the rights of the parties in the matter of the collection of these notes, and should be treated as an adjudication on the merits and, being later in point of time than the judgment of the Appellate Court, is controlling and bars appellant from collecting that judgment.

Looking at the record orders, without considering what is attempted to be shown by the testimony of the reporter and the unsigned bill of exceptions as to what occurred on the trial of the appeal from the disallowance of the claim, the only judgment on the merits in La Salle county was that of the Probate Court disallowing the claim. The order of the Circuit Court dismissing the appeal from that judgment was not a retrial of the case or an adjudication of the merits, and it left the judgment of the Probate Court with the same force and effect as though no appeal from it had been taken. It is said in *County of Menard v. Kincaid*, 71 Ill. 587, that the dismissal of an appeal ordinarily amounts to an affirmance of the judgment appealed from; and in 3 Cyc. 199, that when an appeal or writ of error is dismissed, whether on motion or from other cause, the whole case is out of court, and on page 200,

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that except in cases where an appeal has been prematurely taken or a failure to file the record within the time required, or of defects in the undertaking, or for want of prosecution, the dismissal of an appeal operates as an affirmance of the judgment of the trial court. We know of no precedent for giving a judgment dismissing an appeal at the cost of appellant,—whether the court was induced to enter it on motion of appellant or on its own motion, at any time before trial or during the trial,—the force and effect of a judgment on the merits; and do not see how anything that might be said or done by court and counsel, not a part of the record, would give that order such an effect. But if we consider what took place on the hearing, as shown by the evidence of the official reporter, for the purpose of determining what may have been intended by the order dismissing the appeal, it is very clear that the court did not intend to pass on the merits of the case. Whether appellant was entitled to a judgment on the merits, which it would have been compelled to abide or take an appeal, seems immaterial because no such judgment was entered.

The judgment of the Appellate Court sought to be enforced in the case at bar is later in date than that of the Probate Court. Appellee says, and we presume correctly, that the judgment last in point of time is the judgment to which effect must be given; that the rule is that, "Of two conflicting judgments procured in courts of concurrent jurisdiction on the same cause of action, by the same plaintiff, against the same defendant, that which is later in point of time will prevail." Under the rule announced by appellee and sustained by authority cited from other States, without citing any Illinois authority, and we know of none, the question presented to the trial court on the appeal from the order of the Probate Court was the same as though there was no other judgment than the one sought to be enforced in this proceeding; that is, the

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same order should have been entered on this appeal that would have been entered had there been no showing that there was another and prior judgment on the same subject-matter between the same parties.

The judgment is reversed and the cause remanded with directions to the Circuit Court to enter a judgment directing the administrator to pay the judgment of the Appellate Court of the First District within sixty days or make application for the sale of real estate for the payment of debts.

Reversed and remanded with directions.

Ethelbert C. Richmond, Appellee, v. City of Marseilles, Appellant.

Gen. No. 5,768.

1. MUNICIPAL CORPORATIONS, § 998*—*liability for defective sidewalks.* A city is liable for personal injuries to a pedestrian resulting from a defective sidewalk constructed on private property if it is treated by the city as a public walk and permitted to be used as such.

2. NEGLIGENCE, § 134*—*right of recovery on proof of negligence of one defendant.* One may charge negligence generally against several defendants and recover against those who are proven to have been negligent; so that it is not erroneous to permit recovery where one of two defendants was dismissed without amending the declaration.

3. MUNICIPAL CORPORATIONS, § 1063*—*contributory negligence.* In an action by a pedestrian for injuries resulting from a fall on a defective sidewalk, the fact that he knew that the walk was defective and could have gone another way does not preclude recovery, as the act of walking on the defective sidewalk is not negligence *per se*, but merely a circumstance to be considered by the jury, *inter alia*, in determining whether he was guilty of contributory negligence.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Richmond v. City of Marseilles, 190 Ill. App. 227.

4. MUNICIPAL CORPORATIONS, § 1064*—*effect of failure of pedestrian to take different course.* The fact that a pedestrian might have reached his destination by a route other than that over a defective sidewalk is not negligence *per se*, but merely a circumstance to be considered by the jury in passing upon the question of contributory negligence.

5. MUNICIPAL CORPORATIONS, § 1060*—*care required in using defective sidewalk.* All that the law requires of one walking upon a public sidewalk with the knowledge of its defects, and that there is another way that he could travel upon, is that he should exercise ordinary care for his own safety.

6. MUNICIPAL CORPORATIONS, § 1225*—*sufficiency of notice of claim or injury.* In an action against a city for personal injuries by reason of a defective sidewalk where the plaintiff, in front of his residence, met the city clerk on his way to the city hall and handed a statement of injuries to him, who carried the notice to his office in the city hall and had it there in the presence of the city attorney, and the plaintiff later called upon the clerk in his office upon the subject, it constituted a sufficient filing of the statement of injury, under the statute, immediately upon its reaching the city clerk's office.

7. MUNICIPAL CORPORATIONS, § 1098*—*sufficiency of evidence.* Where it appeared that a pedestrian had attempted to step over a hole or a broken place in a sidewalk and slipped because the walk was wet from rain and caught his toe in the hole and was thrown, evidence *held* sufficient to support recovery for injuries received, the jury's verdict being conclusive of the absence of contributory negligence.

8. MUNICIPAL CORPORATIONS, § 1001*—*when evidence sufficient to show control or possession of sidewalk and driveway.* Where a sidewalk and driveway, constructed on private property, had for fifteen years extended up a hill upon which from sixteen to twenty-five families lived, and where there was a public school and the street and alley commissioners of the city did work upon the walk before and after the accident in question, and the city had paid for repairs on the walk a few months before, evidence *held* sufficient to show that it was treated and permitted to be used as a public walk and driveway.

Appeal from the Circuit Court of La Salle county; the Hon. EDGAR ELDREDGE, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 13, 1914.

H. M. KELLY, for appellant.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Richmond v. City of Marseilles, 190 Ill. App. 227.

BROWNE & WILEY and STEAD, WOODWARD & HIBBS, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Ethelbert C. Richmond fell because of a defective sidewalk in the City of Marseilles and struck against a rock embankment and was injured, and brought this suit against the City of Marseilles and Simon T. Osgood and filed a declaration, in which he sought to recover damages for said injuries. Thereafter, a demurrer by the City to an amended declaration was sustained, and plaintiff elected to abide by his amended declaration, and there was a judgment in favor of the City of Marseilles. The suit was afterwards dismissed as to Osgood. Plaintiff sued out a writ of error from this court. We held the second count of the amended declaration sufficient and reversed and remanded the cause. *Richmond v. City of Marseilles*, 154 Ill. App. 345. Thereafter the general issue was filed by the City and the cause was tried and there was a verdict and a judgment for plaintiff for \$948, from which the City appeals.

It is first contended that there can be no recovery against the City because the sidewalk is not upon a public street. The sidewalk went up Osgood Hill from the valley to the top of the hill and there were from sixteen to twenty-five families who lived upon the hill and there was a public school there. The sidewalk had been there about fifteen years and was used as a public way, and it was adjacent to a driveway up said hill, also used as a public way. The proof was that it was used by the public generally as a public street and sidewalk. The street and alley commissioners of the City did work upon this walk both before and after Richmond was hurt. Before this accident a man employed by the City was seen working upon the walk. A wit-

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ness notified the mayor of holes in the walk two or three months before this accident and the mayor directed him to repair it and put in his bill to the City, and he did so and the City paid the bill. This walk and this driveway were on private property. A city is liable for injuries resulting from defective sidewalks constructed on private property, if they are treated by the city as public walks and permitted to be used as such. *City of Chicago v. Baker*, 195 Ill. 54.

Although Osgood had been dismissed, the second count was not amended. It charged negligence against both the City and Osgood. No attempt was made to prove what relation Osgood bore to this sidewalk. It is contended that having averred negligence by both it was essential to a recovery against the City that the negligence of both be proven. The cases relied upon are where the declaration charged negligence by one defendant in one respect and negligence by another defendant in another respect, and that the two acts of negligence concurred in producing the result. There are no such allegations in this declaration. It is familiar law that one may charge negligence generally against several defendants and recover against those who are proven to have been negligent. The rule contended for by appellant would defeat every action for negligence against more than one defendant, unless the proof showed each defendant negligent.

It is contended that appellee cannot recover because of a variance between the allegations of the second count and the proof as to the exact nature of the break or defect in the sidewalk, which caused the fall. The second count avers that the City and Osgood negligently suffered the same to be and remain in a dangerous and unsafe condition and repair, and negligently permitted a place to be and remain in said sidewalk, at a place definitely located therein by distances from other objects, in a broken, defective, unsecure, unsafe and dangerous condition, rendering said sidewalk at

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said place unsafe and dangerous for foot passengers, and that the defendants knew thereof, or by the exercise of ordinary care might have known thereof, and that, as plaintiff was passing along said walk in the nighttime, in the exercise of all due care, he stepped upon said broken, defective, unsafe and dangerous place in the walk and unavoidably broke through it with his left foot and leg and was thrown violently, etc. Numerous witnesses saw and testified concerning this defect and they did not all describe it alike, and witnesses for the City, who came there a week later, gave a different description from that given by plaintiff's witnesses. It is clear that there was a hole or broken place in the sidewalk and, as plaintiff was stepping over it, he slipped because it was raining and the walk was wet, and he caught his toe in the hole and was thrown. We are of the opinion that the allegations of the second count were sufficient to support a recovery, no matter which description of the broken sidewalk is accepted as most strictly correct, under the principles laid down in *City of Joliet v. Johnson*, 177 Ill. 178; *Guianos v. DeCamp Coal Min. Co.*, 242 Ill. 278, and many other cases.

The proof shows that plaintiff knew the walk was defective and that he could have gone another way. It is urged that for that reason he cannot recover. It is held in *City of Mattoon v. Faller*, 217 Ill. 273, that where one knows of a defect in a sidewalk and walks thereon, that act is not negligence *per se*, but is a circumstance to be considered by the jury with all the other circumstances in determining whether he was guilty of contributory negligence, and that the fact that he might have reached his destination by another route is not evidence of negligence *per se*, but is merely another circumstance to be considered by the jury in determining the question of contributory negligence; and that all the law requires of one walking upon a public sidewalk with knowledge of its defects, and that

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there is another way which he could travel upon, is that he shall exercise ordinary care for his own safety. *Wallace v. City of Farmington*, 231 Ill. 232. Under the evidence the verdict of the jury means that plaintiff was in the exercise of due care as he went upon this sidewalk and sought to step over this defect, and we see no reason to disturb that conclusion.

The statute requires a party about to bring an action against a city for a personal injury to file a statement in writing in the office of the city clerk. It is contended that this provision was not complied with by plaintiff. Plaintiff met the city clerk in front of plaintiff's residence as the clerk was on his way to the city hall, where his office was, and he handed the notice to the clerk there on the street and the clerk carried it with him to the city hall at once and had it there in the presence of the city attorney, and the plaintiff later called upon the clerk in his office upon the subject. We think this ought to be treated as a sufficient compliance with the statute, under the principles laid down in *Donaldson v. Village of Dieterich*, 247 Ill. 522. Plaintiff had no power to file the statement. That must necessarily be the act of the clerk. Plaintiff could only hand it to the clerk. Plaintiff did not hand it to the clerk in the office but he handed it to the clerk when the latter was on his way to the office, and the clerk carried it to the office, and when it had reached the office plaintiff's duty in that respect was at an end. We do not think that plaintiff should be defeated because the clerk carried the paper instead of its being carried by the plaintiff. We think the form of the statement a sufficient compliance with the statute.

We think the instructions not subject to the criticisms made upon them, for the reasons hereinabove stated. It is not argued that the damages are excessive. The judgment is affirmed.

Affirmed.

Richardson Silk Co. v. Mead, 190 Ill. App. 233.

Richardson Silk Company, Appellee, v. D. Raymond Mead, Appellant.

Gen. No. 5,914. (Not to be reported in full.)

Appeal from the County Court of Winnebago county; the Hon. LOUIS M. RECKHOW, Judge, presiding. Heard in this court at the April term, 1914. Reversed with finding of facts. Opinion filed October 13, 1914.

Statement of the Case.

Action in assumpsit by Richardson Silk Company against D. Raymond Mead to recover \$206 as the purchase price of two silk cabinets. From a verdict and judgment for \$25, defendant appeals.

FISHER & NORTH, for appellant.

No appearance for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

1. **ESTOPPEL, § 82***—*effect of silence and acquiescence as to title.* Where plaintiff placed silk cabinets with a customer on consignment to be used by the customer as long as he continued to buy silk of plaintiff, and such customer sold his store to another and plaintiff acquiesced in the sale, and the purchaser transferred the store to the defendant who paid for the store and sold the cabinets in question, in an action to recover the full value of the cabinets, *held* that he could not maintain the action for the full contract price.

2. **SALES, § 221***—*when purchaser from buyer not liable for price.* Where a party placed goods in a store with a customer on consignment and acquiesced in the sale of a store to another, he cannot thus ratify the sale and reject the payment for the goods in question by still another purchaser so as to recover from such other purchaser when the goods were sold by him.

3. **ASSUMPSIT, ACTION ON, § 5***—*effect of action as waiving tort.* Where goods on consignment are sold by the consignee the tort is waived by a suit in assumpsit.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Dux v. Rumsey, 190 Ill. App. 234.

**Joseph Dux v. Marion D. Rumsey et al.
White City Electric Company, Appellant, v. Marion
D. Rumsey et al., Appellees.**

Gen. No. 5,927.

MECHANIC'S LIENS, § 136*—*consideration for agreement waiving right to lien.* Where a provision in a subcontract waives the subcontractor's right to lien "for the consideration hereinafter named" and is followed by a provision that the contractor shall pay to the subcontractor a certain sum for the work done and that the latter shall indemnify the former against liability for any liens or claims arising from its default in the work, *held* that the consideration for the agreement was the promise of the contractor to pay the subcontractor, whether the promise was fulfilled or not, and could not be construed to be that the subcontractor should be paid in full, so that in case it was not so paid the consideration for the agreement failed.

WHITNEY, J., took no part in this decision.

Appeal from the Circuit Court of Lake county; the Hon. CHARLES WHITNEY, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 13, 1914.

SILBER, ISAACS, SILBER & WOLEY, for appellant;
JAMES D. WOLEY, of counsel.

SHERIFF, DENT, DOBYNS & FREEMAN and SAM S. HOLMES, for appellees.

MR. JUSTICE DIBELL delivered the opinion of the court.

Marion D. Rumsey, owner of certain real estate in Lake county, by her husband, Henry A. Rumsey, entered into a written contract with the Warren Construction Company for the erection of a dwelling house and other improvements on said premises. The Warren Construction Company made a subcontract with the White City Electric Company to do certain elec-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

DUX v. Rumsey, 190 Ill. App. 234.

trical work, required by said original contract, for a certain consideration therein named. Afterwards, the Warren Construction Company became bankrupt and failed to complete its contract. Afterwards, Joseph Dux, a subcontractor upon said work, filed a bill in the Circuit Court for a mechanic's lien, making all parties in interest defendants. Thereafter the White City Electric Company filed an amended answer in the nature of a cross-petition for a mechanic's lien upon said premises for \$1,094.91. The court sustained a demurrer by Marion D. and Henry A. Rumsey to said answer. The White City Electric Company elected to abide by its said answer and cross-petition and the same was dismissed for want of equity, and it prosecuted this appeal from said decree.

The original contract contained the following provision:

“The party of the second part, before any payment is made or shall be considered to be due to him under this contract, shall satisfy the party of the first part, by receipts or written waivers of liens by sub-contractors and material men, that the said building is free and unincumbered of and from any and all claims and liens of mechanics, laborers or material men and shall produce and give to the parties of the first part such reasonable and proper protection as may be required, against all future liens and claims of like nature.”

The subcontract between the White City Electric Company and the Warren Construction Company contained the following provision:

“Eighth: The sub-contractor hereby, for the consideration hereinafter named, waives and releases all lien or right of lien now existing or that may hereafter arise for work or labor performed or material furnished under this contract under any lien laws upon said building, the land upon which the same is situated and upon any money or moneys due or to become due from any person or persons to said contractor, and agrees to furnish a good and sufficient waiver of lien

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on said premises from every person or persons and corporation furnishing labor or material for said premises under the sub-contractor.”

The tenth paragraph of said contract provided that the contractor should pay to said subcontractor \$1,600 for the work to be done under said subcontract. It also contained the following provision:

“If at any time there shall be evidence of any lien or claim for which, if established, the contractor or the said premises might become liable, and which is chargeable to the subcontractor, the contractor shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify the contractor against such lien or claim. Should there prove to be any such claim after all payments are made, the sub-contractor shall refund to the contractor all moneys that the latter may be compelled to pay in discharging any lien on said premises made obligatory in consequence of the sub-contractor’s default.”

It is the contention of the owner that by the provisions of said eighth section of the subcontract all right of the subcontractor to a lien upon the premises is waived, and that the words, “the consideration hereinafter named,” in said section 8 means that the consideration for said eighth clause is the promise by the contractor to pay \$1,600 to the subcontractor. It is the contention of the subcontractor that under the provisions above quoted from the tenth section of the contract, the consideration for waiving the lien is that the subcontractor shall be paid in full, and that, as the subcontractor was not paid, the consideration for the waiver of the lien has failed, and the subcontractor is entitled to a lien, notwithstanding the eighth clause.

When parties insert into a carefully prepared contract between them provisions like section 8 of this subcontract, a reasonable interpretation of the contract requires the courts to presume that some purpose was intended to be accomplished by such provision. If the construction contended for by the subcontractor

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here is sustained, it makes the subcontract mean that the subcontractor waives his lien in case he is paid in full. The law gives him no lien if he is paid in full. Therefore the proposed construction deprives section 8 of said contract of all meaning and leaves the contract as it would be if that section had never been written into it. We are of opinion that the intention of the parties in inserting the eighth section was to absolutely waive any lien in behalf of the subcontractor. In causing the eighth section to be inserted the contractor was arranging for the written waiver of lien provided for in the clause above quoted from the original contract. We conclude that the consideration referred to in said eighth paragraph was not payment in full to the subcontractor, but the promise of the contractor to pay the subcontractor, and that the waiver is effective whether that promise was fulfilled or not. By no other construction of the subcontract can the eighth section thereof be given any force and meaning whatever.

The decree is therefore affirmed.

Affirmed.

MR. JUSTICE WHITNEY took no part in this decision.

**Joseph Dux v. Marion D. Rumsey et al.
James A. Miller & Brother, Appellants, v. Marion D.
Rumsey et al., Appellees.**

Gen. No. 5,928. (Not to be reported in full.)

Appeal from the Circuit Court of Lake county; the Hon. CHARLES WHITNEY, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 13, 1914.

Statement of the Case.

This case is substantially the same as *Dux v. Rumsey, ante*, p. 234. Appellants were subcontractors and

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filed an amended answer in the nature of a cross-bill in the same proceeding. The decision filed in the above mentioned case held controlling.

WHITNEY, J., took no part in this decision.

SILBER, ISAACS, SILBER & WOLEY, for appellants;
JAMES D. WOLEY, of counsel.

SHERIFF, DENT, DOBYNS & FREEMAN and SAM S. HOLMES, for appellees.

MR. JUSTICE DIBELL delivered the opinion of the court.

Peter Fippinger, Appellant, v. Henry F. Glos, Appellee.

Gen. No. 5,932. (Not to be reported in full.)

Appeal from the Circuit Court of Du Page county; the Hon. MAZZINI SLUSSER, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 13, 1914.

Statement of the Case.

Action by Peter Fippinger against Henry F. Glos to recover for personal injuries sustained by plaintiff by reason of a horse which plaintiff was driving becoming frightened at defendant's auto truck, which plaintiff claims was being driven at excessive speed. To reverse a judgment in favor of defendant, plaintiff appeals.

CHARLES W. HADLEY, for appellant; JOHN W. LEIDLE, of counsel.

CORNELIUS R. ADAMS, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

1. DAMAGES, § 178*—*when expert evidence as to cause of physical condition competent.* In an action for personal injuries, physicians may be permitted to testify for defendant what in their opinion could have produced the conditions which plaintiff claimed to be suffering from after the accident.

2. AUTOMOBILES AND GARAGES, § 3*—*when proof of experiments as to speed of motor vehicles competent.* Proof of experiments made by experts as to the speed at which defendant's auto truck could be driven, *held* competent on behalf of defendant without proof that the conditions were identically the same, where it was practically impossible to produce the exact conditions owing to the fact that defendant was not served with process until more than nine months after the accident.

3. AUTOMOBILES AND GARAGES, § 3*—*when declaration insufficient to warrant instruction in language of statute.* A count in a declaration charging that defendant drove his motor truck at "a high, excessive, unreasonable and dangerous rate of speed, to-wit, at the rate of 30 miles per hour," *held*, by reason of the *videlicet*, not to charge that the vehicle was being driven at any particular number of miles per hour, and therefore not to justify an instruction that running a motor vehicle at a speed of more than twenty miles per hour was *prima facie* evidence that the rate of speed was greater than was reasonable and proper under section 10 of the Motor Vehicle Act of 1911, J. & A. ¶ 10,010.

4. NEGLIGENCE, § 223*—*sufficiency of instruction defining proximate cause.* A requested instruction defining "proximate cause" as a cause "without an intervening or efficient cause," *held* to be less likely to be understood than the words "proximate cause" themselves.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Thompson v. Chicago, Ottawa & Peoria Ry. Co., 190 Ill. App. 240.

Mamie Thompson, Appellee, v. Chicago, Ottawa & Peoria Railway Company, Appellant.

Gen. No. 5,945. (Not to be reported in full.)

Appeal from the Circuit Court of La Salle county; the Hon. EDGAR ELDRIDGE, Judge, presiding. Heard in this court at the April term, 1914. Reversed and remanded. Opinion filed October 13, 1914.

Statement of the Case.

Action by Mamie Thompson against the Chicago, Ottawa & Peoria Railway Company for personal injuries sustained by plaintiff in a collision between a vehicle in which she was riding and one of defendant's cars at a highway crossing. The evidence showed that when the accident happened, which was in the night-time, the plaintiff and her sister and the latter's children were riding in a surrey driven by her sister's husband. The negligence charged was that the defendant negligently ran its car over said highway at a rapid rate of speed and also failed to ring a bell or sound a whistle, and also charged that the defendant negligently failed to keep a proper lookout. Defendant pleaded not guilty and there was a jury trial and a verdict awarding plaintiff five thousand dollars damages. Motions for a new trial and in arrest of judgment were denied and judgment entered on the verdict. To reverse the judgment, defendant appeals.

DUNCAN, DOYLE & O'CONOR, for appellant.

D. R. ANDERSON and BUTTERS & ARMSTRONG, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

McCormick v. Higgins et al., 190 Ill. App. 241.

Abstract of the Decision.

1. RAILROADS, § 733*—*when evidence insufficient to show negligence in operating car at highway crossing.* In an action against an interurban electric railway company to recover for personal injuries sustained by plaintiff in a collision between a vehicle in which she was riding and one of defendant's cars at a highway crossing, *held* that the preponderance of the evidence did not support the charges of negligence that defendant was running the car at excessive speed, or that it failed to blow the whistle on approaching the crossing, nor support any other charge of negligence in the operation of the car.

2. RAILROADS, § 607*—*care on approaching highway crossings.* In the operation of railway trains the demands and necessities of the traveling public are such that it is not required of railway companies to bring their cars to a stop or to a low speed on approaching highway crossings so that those driving on the highway and seeing the train approaching may pass over ahead of the train; on the contrary, those in charge of the train, with a proper headlight in the nighttime and after giving the customary signal, have the right to assume that a team approaching the crossing will stop before it reaches it and wait for the train to go by.

P. H. McCormick, Defendant in Error, v. Frank M. Higgins and Cora Higgins, Plaintiffs in Error.

Gen. No. 5,948.

1. APPEAL AND ERROR, § 1069*—*joinder in error.* The filing of briefs and arguing a cause upon the merits are equivalent to a formal joinder in error.

2. APPEAL AND ERROR, § 1074*—*effect of failure to join in error.* The Practice Act of 1907 (Hurd's R. S. 1913, ch. 110, § 108, J. & A. ¶ 8645) requires a case to be treated as if error had been joined, where error has been assigned and the opposite party does not plead in proper time.

3. APPEAL AND ERROR, § 1073*—*effect of joinder in error.* A joinder in error does not bar pleas, but on the contrary, pleas prevent a subsequent joinder in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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4. APPEAL AND ERROR, § 1073*—*effect of joinder in error.* A joinder in error to an error assigned is, in effect, a demurrer to such assignment.

5. APPEAL AND ERROR, § 1145*—*when pleas constitute abandonment of joinder in error.* The subsequent filing of pleas in legal effect constitutes an abandonment of a joinder in error to the assignments to which the pleas are directed.

6. APPEAL AND ERROR, § 1783*—*what constitutes confession of errors.* Where pleas in bar are filed to a writ of error and the pleas are not sustained as bad in law upon demurrer, or as not supported by proof upon trial, they confess the errors assigned, and the judgment or decree must be reversed, whether the supposed errors assigned do in fact exist upon the record or not, and the court which finds the pleas insufficient will not consider whether the errors are justly assigned or not; and, on the other hand, if the pleas are sustained, the judgment or decree must be affirmed.

7. APPEAL AND ERROR, § 1783*—*effect of plea of release of errors.* Under the Practice Act of 1907 (Hurd's R. S. 1913, ch. 110, § 109, J. & A. ¶ 8646), as an exception to the general rule, a plea of release of errors adjudged bad or not sustained does not deprive the defendant of the right to join in error.

8. APPEAL AND ERROR, § 1145*—*pleading to writ of error.* Whatever the rule may have been at ancient common law or in other jurisdictions, the practice in this State permits several pleas and several replications to pleas to be made to a writ of error.

9. APPEAL AND ERROR, § 1145*—*power to allow additional pleas to writ of error.* As more than one plea can be filed to assignments of error, and as amended pleas can be filed thereto by leave of court, it follows that power exists in the court to permit additional pleas to be filed.

10. JUDGMENT, § 281*—*when statutory limitation against vacating decrees begins to run.* A decree in a foreclosure suit against one served by publication is not final, and the statute of limitations does not begin to run until either one or three years after the entry of the decree, depending upon whether defendant received the notice required to be sent him by mail, since a defendant or his successor in interest may within one year after notice in writing given him of such decree, or within three years after such decree, if no such notice has been given him, appear and be heard and permitted to answer.

11. APPEAL AND ERROR, § 625*—*statutory limitations for writ of error.* Where pleas are treated as admitting that a defendant did not receive written notice of a decree of foreclosure, the decree was not final until three years thereafter, and the Practice Act of 1872, as amended in 1877, § 85, gave them five years within which

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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to sue out a writ of error, or eight years in all, and constituted a bar in the case in question.

12. APPEAL AND ERROR, § 625*—*statutory limitations for writ of error.* Under the Practice Act of 1907 (Hurd's R. S. 1913, ch. 110, § 117, J. & A. ¶ 8654), three years is fixed as the limit for suing out a writ of error, except where the defendant is an infant, *non compos mentis* or under duress, when a decree is entered.

13. PLEADING, § 11*—*when allegation of certain length of time includes smaller length of time.* A plea that a certain thing was not done within eight years before a certain date, includes an allegation that it was not within four or six years before that date, in determining a statutory bar to a suit.

14. APPEAL AND ERROR, § 1070*—*effect of a good plea to assignment of error.* One good defense defeats an action, so that if one plea is good the assignments of error to which such plea is directed are defeated.

15. JUDGMENT, § 252*—*when record may be corrected after the term.* Where an order of service in a suit for foreclosure showed defendants to be residents of "Geneva Lake, Wisconsin," and the affidavit of nonresidence stated that defendants resided in the city of "Lake Geneva" in said State, *held* that the court had jurisdiction to amend the order to correspond with the affidavit after the expiration of the term and after a writ of error was barred by the statute of limitations.

16. MORTGAGES, § 393*—*when debt becomes due.* Where a mortgage, given to secure a note due five years after date with interest at six per cent. per annum until paid, provided that if default be made in the payment of interest on the note at any time the whole principal and interest should become due at the option of the mortgagee, *held*, upon such default in the payment of interest, a bill to foreclose would properly lie after the expiration of a year, although nothing in the note standing alone indicated that it had fallen due.

17. NOTARIES, § 8*—*effect of failure to file memorandum of appointment.* Where an affidavit of nonresidence of defendants was sworn to before a notary public before a memorandum of his appointment had been entered in the office of the county clerk, as required by statute (Hurd's R. S. 1913, ch. 99, § 5, J. & A. ¶ 7841), *held* the notary's failure thus to comply with the statute did not go to the validity of the foreclosure in question.

18. PLEADING, § 321*—*verification before an attorney.* While the practice of verifying papers in a cause before a notary public who is an attorney therein is disapproved, yet it is not reversible error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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19. **AFFIDAVITS, § 3***—*validity of oath administered by solicitor.* Where a decree of foreclosure allowed a solicitor's fee, pursuant to a mortgage, and it was sought to set aside the decree over eight years after it was entered on the ground that the solicitor was, by reason of his fee, such a party in interest as to invalidate the affidavit sworn to before him upon which the decree by publication was based, *held* the attacks upon the affidavit would not be sustained, as the entire sum was directed to be paid to complainant, and the right of the solicitor to his fee depended upon his contract with his client and not upon the provisions of the mortgage.

20. **EVIDENCE, § 16***—*judicial notice of location of city.* The court will take judicial notice that a city named is in a certain county of the State.

21. **NEWSPAPERS, § 1***—*what constitutes.* Where a publication is called in the certificate of publication the "Weekly Fair Dealer," and the service order finds that it is a paper of general circulation published in a certain city, it is sufficiently designated as a newspaper to satisfy the statute.

22. **NOTICE, § 58***—*when finding sufficient to show publication in proper county.* A finding that a newspaper is published in a certain county is sufficient to show that it was "printed" in such county, as its publication satisfies the spirit of the requirements of the statute.

23. **MORTGAGES, § 375***—*grounds for strict foreclosure.* Where mortgaged premises are worth no more than the mortgage debt and the debtor is insolvent, and the creditor is willing to take the property in satisfaction of the debt and the costs, it is proper to decree a strict foreclosure.

24. **MORTGAGES, § 375***—*evidence warranting strict foreclosure.* Evidence *held* sufficient to warrant a decree of strict foreclosure.

25. **MORTGAGES, § 71***—*merger of oral agreement in writing.* At the time of giving a note and mortgage to secure it, oral and contemporaneous arrangements are merged in the papers which the parties execute.

26. **MORTGAGES, § 375***—*evidence insufficient to open decree of strict foreclosure.* Evidence *held* insufficient upon the merits to open up a decree of strict foreclosure eight years after rendition.

Error to the Circuit Court of La Salle county; the Hon. EDGAR ELDREDGE, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 13, 1914. Certiorari denied by Supreme Court (making opinion final).

BUTTERS & CLARK, for plaintiffs in error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

H. M. KELLEY, for defendant in error.

MR. JUSTICE DIBELL delivered the opinion of the court.

On May 5, 1904, Frank M. Higgins and Cora, his wife, executed and delivered to P. H. McCormick a mortgage on an undivided one-eleventh of certain pieces of real estate in LaSalle county, Illinois, to secure the payment of a note for the principal sum of \$1,622.33, and the same was duly recorded. Thereafter on July 29, 1905, McCormick filed against Higgins and his wife, Cora, a bill in the Circuit Court of LaSalle county for a strict foreclosure of said mortgage, it being charged that Higgins was in default in the payment of interest and that the mortgaged property had thereby become defaulted and that the property was scant security for the debt and that Higgins was financially unable to pay the debt, and that in the undivided condition of the property the value of the property mortgaged was wholly insufficient to pay the debt and costs. There was service upon the defendants by publication and by mailing of notice, and certificates of publication and of mailing of notice were filed in the cause. There was also filed a summons for the defendants to the sheriff of LaSalle county, with his return thereon that said defendants were not found in his county. On October 12, 1905, at the return term, an order was entered finding service and jurisdiction, and entering the default of the defendants, and taking the bill as confessed and referring the cause to the master to report proofs and findings. Thereafter the master filed a report of proofs taken before him and of his findings therefrom, and including the finding of default in the payment of interest, and that the whole sum secured by the note was due, and finding the amount due; and that Higgins, the maker of the note, was insolvent, and that the mortgaged property was scant security for the amount due, and that a decree

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of strict foreclosure should be entered. On October 20, 1905, a final decree was entered, finding due the complainant, including solicitor's fees, \$1,863.47, and that McCormick was willing to take the premises in full satisfaction of the amount due on the note and the costs; and decreeing that if the said sum with interest and costs be paid within ninety days, McCormick should reconvey the premises to Higgins and discharge the mortgage of record, but that in default of his paying that sum within that time, the defendants be barred and foreclosed of all equity of redemption, and that McCormick then be let into possession of the premises. On February 19, 1906, McCormick filed in said cause a petition stating that the time had elapsed and that no payment had been made and that he had paid the costs, and asking that an order be entered barring defendants of all right in the property; and on that day there was a hearing and a supplemental order or decree finding the facts and barring Higgins and his wife of any right in the premises, and bestowing full title upon McCormick the same as though conveyed to him by a proper deed by Higgins.

On January 31, 1914, McCormick filed in said cause a motion to redocket the cause and to amend the order of service of October 12, 1905, in the particulars set out in said motion, and he proved due service of notice of said motion upon Higgins and wife, and they appeared by their solicitor and moved the court to set aside the default and all orders, decrees and proceedings entered in said cause. Both motions were thereupon heard upon proofs presented, and afterwards on February 19, 1914, the motion to amend the service order was granted, and the motion to vacate the default and orders and decrees in the cause was denied, and Higgins and wife obtained a certificate of the evidence produced at that hearing.

Thereafter on April 7, 1914, Higgins and wife filed in this court a complete record of said cause, with

thirteen assignments of error thereon, and on the same day McCormick filed his appearance in writing in this court in said cause. The cause has been treated as if a writ of error issued from this court on April 7, 1914, but, in fact, no writ of error was issued, but the record filed on that date was treated as equivalent to a return to a writ of error. It is stated in a type-written brief for Higgins that McCormick filed a joinder in error on April 7th, but this is a mistake. What he filed was an entry of appearance and a waiver of service of process, which process would have been a scire facias to hear errors assigned. On April 9th, by leave of court, Higgins and wife filed briefs instanter. McCormick filed briefs on April 18, 1914. The case was submitted on briefs and oral arguments on April 29th. The briefs for McCormick raised the defense of the statute of limitations, but at that time he had no plea on file presenting that defense. On May 7th, he asked leave to withdraw such parts of his brief as purported to answer the third, fourth, fifth, sixth, seventh, tenth and eleventh assignments of error and to file instanter a plea or pleas of the statute of limitations as to said assignments of error. That motion was granted, and he filed two pleas to said assignments of error. Plaintiffs in error filed a demurrer to said pleas, and on their motion we heard oral arguments upon said demurrer on May 21st. Defendant in error then entered his motion to amend said two pleas by striking out the word "three" before the word "years" wherever that occurred in said pleas, and inserting the word "five." We denied the motion for leave to so amend said pleas, but granted leave to file additional pleas by the following Monday, and defendant in error did file additional pleas to the same assignments of error; and on motion of plaintiffs in error their demurrer on file was ordered to stand to said additional pleas. The cause was submitted on the demurrer. This was all at the April term. Thereafter on July 31, 1914, in vacation, plaintiffs in error

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entered their motion for leave to withdraw their demurrers as to said additional pleas, and to vacate and set aside the order granting leave to file said additional pleas, and moved to strike said additional pleas from the files and to reverse the decree; and said motion was argued by each side upon typewritten briefs. It is contended by plaintiffs in error that nothing was due upon the note when the bill to foreclose was filed and that that fact appeared on the face of the papers; that the affidavit for publication was insufficient to confer jurisdiction because it was sworn to before a notary public, a memorandum of whose appointment had not been entered with the county clerk, and because he was a solicitor in the cause; that the order of service was insufficient; that the proof before the master did not show sufficient to authorize a decree of strict foreclosure; that the court had no jurisdiction in 1914 to amend the service order; that the proofs were insufficient to authorize the amendment which the court then made; and that under the proofs then presented by plaintiffs in error, the decree should have been vacated. It is also contended by plaintiffs in error that in a court of appeal the court has no power to permit more than one plea to be filed to a writ of error, nor to permit any plea to be filed after joinder in error unless the latter is withdrawn; that where two pleas have been filed and demurred to, the court has no power before deciding the demurrer to them to permit them to be amended or to permit additional pleas to be filed; that the additional pleas must therefore be stricken from the files; that the two pleas first filed are insufficient, and that therefore the assignments of error to which said first two pleas were directed are confessed, and a reversal must follow.

The pleas were in bar of assignments of error Nos. 3, 4, 5, 6, 7, 10 and 11. The third assignment of error assailed the action of the Circuit Court in entering

the original decree; the fourth, the finding of jurisdiction and entering of the default; the fifth, the finding that the defendants were in default in paying either interest or principal on the note; the sixth assignment was that the decree confirming the master's report and ordering a strict foreclosure was not supported by the evidence; the seventh, that said decree is contrary to law; the tenth, that the decree was without notice to the defendants, and is contrary to law, and is not supported by the competent evidence, and is contrary to equity and is unconscionable; the eleventh, that the court erred in confirming the master's report because entered without notice to the defendants and without notice of the hearing before the master.

Plaintiffs in error contend that defendant in error could not plead because he had not withdrawn his joinder in error. There was no formal joinder in error, but he filed briefs upon the merits and argued the cause upon the merits. This was equivalent to a formal joinder in error. *De Beukelaer v. People*, 25 Ill. App. 460; *Ferrias v. People* 71 Ill. App. 559; *People v. Rudorf*, 149 Ill. App. 215. But these rulings are in reality based upon section 79 of the Practice Act of 1872 (J. & A. ¶ 8645), and section 108 of the Practice Act of 1907 (J. & A. ¶ 8645), which require the case to be treated as if error has been joined if the opposite party does not plead in proper time. If the defendant in error could not file pleas without leave of court, he obtained such leave of court; and this was a proper exercise of discretion, for his briefs showed that he in fact relied upon the statute of limitations as a defense to the assignments of errors above recited. A joinder in error does not bar pleas, but, on the contrary, pleas prevent a subsequent joinder in error. A joinder in error to an error assigned is in effect a demurrer to such assignment. *Austin v. Bainter*, 40 Ill. 82; *Farwell v. Sturges*, 165

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Ill. 252; *Cass v. Duncan*, 260 Ill. 228. In asking leave to file pleas to the assignments above specified, plaintiff in error asked leave to withdraw his brief as to those assignments of error. It is insisted that this did not withdraw his joinder in error on those assignments. It was no doubt so intended, but, if not, the filing of the pleas was in legal effect an abandonment of the joinder as to those assignments to which the pleas were directed.

Where pleas in bar are filed to a writ of error and said pleas are not sustained because bad in law upon demurrer, or because not supported by the proofs upon trial, they confess the errors assigned, and the judgment or decree must be reversed, whether the supposed errors assigned do in fact exist upon the record or not, and the court which finds the pleas insufficient will not consider whether the errors are justly assigned or not; and, on the other hand, if the pleas are sustained, the judgment or decree must be affirmed. *Austin v. Bainter*, *supra*; *Clapp v. Reid*, 40 Ill. 121; *Ruckman v. Alwood*, 44 Ill. 183; *Holt v. Rees*, 46 Ill. 181; *Thornton v. Houtze*, 91 Ill. 199; *Page v. People*, 99 Ill. 418; *International Bank of Chicago v. Jenkins*, 104 Ill. 143; *Mahony v. Mahony*, 139 Ill. 14; *Beardsley v. Smith*, 139 Ill. 290; *Martin v. Commissioners of Scotland Tp.*, 150 Ill. 158; *Schaeffer v. Ardery*, 238 Ill. 557; *Peterson v. Manhattan Life Ins. Co.*, 244 Ill. 329; *George v. George*, 250 Ill. 251. There is now one exception to this rule. Under section 109 of the Practice Act of 1907 (J. & A. ¶ 8646), a plea of release of errors adjudged bad or not sustained does not deprive the defendant of the right to join in error. *Schaeffer v. Ardery*, *supra*; *Cass v. Duncan*, *supra*; *Lott v. Davis*, 262 Ill. 148. It is contended that the court had no power to permit more than one plea to be filed. Whatever the rule may have been at ancient common law or is in other jurisdictions, the practice in this State permits several

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pleas and several replications to pleas to be filed to a writ of error. *Austin v. Bainter, supra*; *Corwin v. Shoup*, 76 Ill. 246; *Thornton v. Houtze, supra*; *Page v. People, supra*; *Trapp v. Off*, 194 Ill. 287; *Schaeffer v. Ardery, supra*; *Lott v. Davis, supra*. In *Austin v. Bainter, supra*, there were two pleas, to which plaintiff in error demurred, but, before the court rendered a judgment upon the demurrer, leave was given defendant in error to file amended pleas. Amended pleas to a writ of error therefore can be filed, and it may well be that defendant in error was entitled to have his motion of May 21st, to amend his pleas, granted, but the same object was accomplished by permitting him to file additional pleas. As more than one plea can be filed to assignments of error, and as amended pleas can be filed thereto by leave of court, it must follow that power exists in the court to permit additional pleas to be filed.

The first plea, after setting out the respective dates when said order of default, decree of foreclosure and decree of confirmation were entered, alleged that plaintiff in error did not sue out this writ of error or assign said specified errors within five years after said orders and decrees were entered. The second plea averred that said alleged errors were committed by the Circuit Court of La Salle county more than five years prior to the suing out of this writ of error, and that the same are barred by the statute of limitations. The first additional plea set out the respective dates of said orders and decrees, namely, October 12, 1905, October 20, 1905 and February 19, 1906, and alleged that plaintiffs did not sue out said writ of error nor assign said errors within six years after said errors are alleged to have been committed, nor within six years after any order or decree on which error is so assigned, nor within six years after February 19, 1906, the date of the last order in said cause. The second additional plea averred that the alleged errors

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so assigned were committed by the Circuit Court of LaSalle county more than three years before April 7, 1914, the date when plaintiffs in error sued out their writ of error in this court; that plaintiffs in error were not served personally in said cause, but by publication, and that said judgment did not become final until February 19, 1909, and that more than three years from February 19, 1909, elapsed before the suing out of the writ of error in this cause, and that the same was therefore barred by the statute of limitations. The third additional plea averred that the writ of error was issued and the record filed in this cause on April 7, 1914, and it averred the date of the several orders and decrees as before stated on October 12, and 20, 1905, and February 19, 1906, the latter being the final order, and that no other order or decree was thereafter entered in said cause, and that plaintiffs in error did not sue out this writ of error within eight years after errors are alleged to have been committed, or within eight years after any decree upon which error is so assigned, nor within eight years after the final decree in said cause. The fourth additional plea averred that the alleged errors so assigned were committed by the Circuit Court on different dates between October 11, 1905, and February 20, 1906, and that on April 7, 1914, when this writ of error was sued out and the record filed, plaintiffs in error were without right to have said assignments of error heard and determined or to have said decree reversed, because the statute of limitations of this State had run and the time had passed within which plaintiffs in error might sue out a writ of error and assign the errors above enumerated.

The reason why it was deemed proper to permit these different pleas to be filed arises from the following considerations: Section 117 of the Practice Act of 1907 (J. & A. ¶ 8654) fixes three years as the limit for suing out a writ of error, except where the plaintiff in error is an infant, *non compos mentis* or under

duress, when the same was entered, but the statute in force when the decree was rendered seems to be the one which applies, and the statute then in force was section 85 of the Practice Act of 1872, as amended in 1877, and the limitation to a writ of error was five years from the rendition of the decree or judgment complained of. Moreover, section 19 of the Chancery Act (J. & A. ¶ 899) provides that when any final decree is entered against any defendant, who has not been summoned or served with a copy of the bill or received the notice required to be sent him by mail, such defendant or his successors in interest may within one year after notice in writing given him of such decree or within three years after such decree, if no such notice has been given him, appear and be heard and permitted to answer. Under these provisions the decree in the case of one served by publication is not final and the statute of limitations does not begin to run until either one or three years after the entry of the decree, depending upon whether the plaintiff in error received the notice required to be sent him by mail. *Lyon v. Robbins*, 46 Ill. 276; *Sale v. Fike*, 54 Ill. 292; *Martin v. Gilmore*, 72 Ill. 193; *Wellington v. Heermans*, 110 Ill. 564; *Caswell v. Caswell*, 120 Ill. 377; *Burton v. Perry*, 146 Ill. 71. On the hearing in 1914 of the motion by plaintiffs in error in the Circuit Court to vacate the decree, there was evidence tending to show that Higgins did not receive the notice mailed him in 1905, and other evidence tending to show that he did receive it. We assume that the matters shown on that motion in 1914 are not entitled to be considered in determining whether, in passing upon the sufficiency of these pleas, the record shows that plaintiffs in error did or did not receive the notice required to be sent them by mail. We are not aware that those words in section 19 of the Chancery Act have received a construction by the Supreme Court. This record shows that notice was mailed to them in conformity with the statute. If that is treated

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as prima facie proof that they received the notice, then the statute of limitations in this case would be five years after October 20, 1906, or six years after the entry of the decree in October 20, 1905, but there is no averment in the pleas that plaintiffs in error did receive the notice mailed them, and if the pleas are to be treated as admitting that they did not receive such notice, then the decree was not final under the above authorities for three years, and the statute gave them five years thereafter in which to sue out a writ of error, or eight years in all. If, as we hold, the decree of October 20, 1905, was the final decree, then the statute became a bar in any event after October 20, 1913. If the order of confirmation of February 19, 1906, is the final decree, then the writ of error was barred after February 19, 1914. In either case it was barred before this writ of error was sued out. We cannot concur in the position of plaintiff in error that if the plea asserts that the writ of error was not brought within a greater number of years than that prescribed by statute then the plea is bad, but concur in the view of that subject stated in *Adams Exp. Co. v. King*, 3 Ill. App. 316, on the principle that the less is included in the greater, and that a plea that a certain thing was not done within eight years before a certain date includes an allegation that it was not done within four or six years before that date. In their typewritten brief plaintiffs in error contend that this decree did not become final until after the statute of 1907 was in force and therefore the Three-Year Statute of Limitations is the only one which applies; but we are of opinion that under the authorities above cited, plaintiffs in error had eight years from the entry of the decree of October 20, 1905, in which to sue out a writ of error. The motion to withdraw the demurrer to the additional pleas, and to strike them from the files, and to reverse the decree is denied, and the demurrer is sustained to the first and second pleas and to the first and second

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additional pleas, and is overruled as to the third and fourth additional pleas. Plaintiffs in error contend that if one plea is bad it confesses the errors assigned to which the plea is directed and the decree must be reversed. We hold, on the contrary, that one good defense defeats the action, and that if one plea is good the assignments of error to which such plea is directed are thereby defeated. In *Corwin v. Shoup, supra*, three pleas were filed to a writ of error, and a demurrer was sustained as to the first plea but overruled as to the second and third pleas, and thereupon the judgment was affirmed and the writ of error dismissed. The assignments of error to which these pleas were directed were all the assignments which questioned the original proceedings in 1905 and 1906, and the overruling of the demurrer to the third and fourth additional pleas to said assignments of error must result in an affirmance of these orders and decrees.

The errors assigned, to which no plea was filed, question the action of the court upon the motion by defendant in error to amend the service order and the action of the court upon the motion of plaintiffs in error to set aside the default and all orders and decrees in the cause, which motions were entered on January 31, 1914, and decided on February 19, 1914. The service order found that the affidavit of nonresidence on file showed that the defendants and each of them were residents of "Geneva Lake," Wisconsin, and that within ten days after the first publication of notice of the pendency of the suit the clerk of the court mailed a copy of said publication to each of said defendants, postage prepaid, properly addressed to said Frank M. Higgins and Cora Higgins at "Geneva Lake," Wisconsin. In fact the affidavit of nonresidence on file among the papers in said cause, and filed on the same day that the bill to foreclose was filed, stated that said defendants resided "in the city of Lake Geneva, in the County of Walworth and State of Wisconsin," and

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that the post office address of each of them was "Lake Geneva, County of Walworth and State of Wisconsin," and the certificate of the publisher showed that the first publication of notice was on August 4, 1905, and the certificate of the clerk showed that on August 5, 1905, he sent by mail, postage prepaid, a copy of said notice to "Frank M. Higgins, Lake Geneva, County of Walworth, Wisconsin," and to "Cora Higgins, Lake Geneva, County of Walworth, Wisconsin." The sole object of the proposed amendment of the service order was to change the words "Geneva Lake" to "Lake Geneva." The jurisdiction of the court to amend at a later term in a matter of form is sustained in *Channel v. Merrifield*, 206 Ill. 278, and many other cases, and is authorized by statute. We doubt if the amendment was essential. There is no claim that in Walworth county, Wisconsin, there are two places and post offices, one named "Lake Geneva" and the other named "Geneva Lake." It is held in *Turner's Adm'r v. Patton*, 49 Ala. 406, that the courts will take judicial notice of the post roads and post offices of the United States. Where a court may take judicial notice the judges thereof may also resort to any available source of information where the personal knowledge of the judges needs such assistance. From such sources it seems to be the fact that there was in 1905 and still is in Walworth county, Wisconsin, a post office named "Lake Geneva," and that there was not then and is not now in that county or State a post office named "Geneva Lake," and further that under the practice prevailing in the post office department a letter duly stamped and mailed, addressed to a person at "Geneva Lake, Wisconsin," would be sent to "Lake Geneva, Wisconsin." But *Malaer v. Damron*, 31 Ill. App. 572, holds that the courts will not take judicial notice that a post office is established at a particular place. Even if we follow that rule, we do not think the mere transposition of the two words of a name should have the

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effect here contended for. Suppose a notice had been duly mailed to a defendant addressed to him at New York City, New York State. Could it be supposed that the proceedings would be in anyway invalidated if it appeared that the legal name is "The City of New York"? We think not. The affidavit and certificate on file and therefore a part of the record, authorized the amendment, and this, notwithstanding the order was entered by a judge now deceased. The order amending the service order must therefore be affirmed.

In our opinion the motion by plaintiffs in error made January 31, 1914, to set aside the default and all orders and decrees in the cause, comes too late. The decree of October 20, 1905, was a final decree and established the rights of the complainant against the defendants. It was so held in *Ellis v. Leek*, 127 Ill. 60, where a like decree was under consideration, and the cases are there reviewed. The order of February 19, 1906, repeated some provisions of the decree of October 20, 1905, but this was unnecessary. As already shown, the statute of limitations ran against a writ of error to question that decree in eight years thereafter, under the most favorable construction of the statutes governing that question. That eight years expired on October 20, 1913, and this motion was after that date. If these matters set up in the court below by defendants in error could be heard on mere motion, still we would be of opinion that the same limitation applies to an effort to question the decree by motion as it would be by a writ of error, or that by analogy to the statute of limitations the right to have the court consider such a motion is barred by laches. On February 19, 1906, the court did enter an order finding that defendants had not paid the amount fixed by the decree within the time given them therein in which to pay it. Eight years from that date had not expired when this motion was interposed, and if defendants in error were seeking to show that they paid said decree within said

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ninety days, it may well be that they could question that last order by a proper bill in equity, but they offered no proof having any tendency to show that they have ever paid anything upon said decree. We therefore conclude that the statute of limitations or laches deprived the court of any authority to entertain or grant said motion, interposed in 1914, even if these matters could be raised by motion after the term. We are further of opinion that what is here sought to be done could not in any event be accomplished after the term by mere motion, but only by a writ of error or bill in equity. In *Ernst Tosetti Brewing Co. v. Koehler*, 200 Ill. 369, a decree was entered at the May term. At the October term the defendant moved to vacate said decree, and supported that motion by affidavits to the effect that the solicitor for complainant had by misrepresentation and fraud procured the court to enter said decree. The trial court vacated said decree, and afterwards entered a decree for defendant at a still later term. The Supreme Court held that the court erred in vacating the original decree at a later term; that after the term the decree could be corrected on motion in matters of form and as to clerical errors, but that the court was without power at that later term to set aside, vacate, modify or annul said decree. The court there said: "No error of law of any kind will justify revising or annulling a decree at a subsequent term in a summary way on a motion, but relief against it must be obtained by appeal or writ of error if the error is apparent on the face of the record, and if not, by bill of review or bill to impeach the decree for fraud or other sufficient cause." The court there further said: "A decree regularly entered cannot be altered or amended after the term has elapsed, except for the correction of matters of form or clerical errors,—and even such amendments cannot be made merely upon the evidence of solicitors contradicting what appears of record. These rules have been settled by repeated

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decisions of this court. (*Cook v. Wood*, 24 Ill. 295; *State Savings Institution v. Nelson*, 49 id. 171). A decree cannot be vacated or amended at a subsequent term on motion or petition for the purpose of correcting an alleged error which involves the merits of the case. (5 Ency. of Pl. & Pr. 1049.) The proper method of impeaching and setting aside a decree after the term is to file an original bill in the nature of a bill of review when such decree may be set aside, reversed or modified, according to the equities of the parties." The same rules are announced in many other cases. We are of opinion that the matters relied upon in support of the motion were, except in one or two respects, beyond the reach of the court on mere motion after the term.

The foregoing conclusions dispose of this case and require the affirmance of the decree and orders assailed. But as it has been strenuously contended by counsel for plaintiffs in error in briefs and in oral argument and typewritten arguments that the decree is without a semblance of justification in law or fact and should shock the conscience of the court, and that if we approve these proceedings it will be the first time such a result has been reached in an Appellate tribunal in this State, and as a bill in the nature of a bill of review is now barred, we have concluded to discuss the case further.

It is contended that when this bill was filed nothing was due complainant and therefore the court had no jurisdiction to foreclose this mortgage. The note was dated May 5, 1904, was due on or before five years after date for \$1,622.33, with interest at six per cent. per annum after date until paid. If the note stood alone there was nothing due upon it when the bill was filed; but the mortgage described the note as "with interest at the rate of six per cent. payable annually," and it provided that if default be made in the payment of the note or any part thereof, "or the interest thereon or

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any part thereof at the time and in the manner specified for the payment thereof," then the whole of the principal and interest should become due at the option of the mortgagee, and the mortgage might immediately be foreclosed. Therefore the mortgage required the payment of interest annually, and it was not paid, and the filing of the bill was an election to declare the whole sum due, and the bill to foreclose was properly filed on July 29, 1905.

The affidavit of nonresidence was sworn to before H. M. Kelly, a notary public. Section 5 of chapter 99 of the Revised Statutes (J. & A. ¶ 7841) requires a notary public, before entering upon the duties of his office, to have a memorandum of his appointment and of the time when his office will expire entered in the office of the county clerk of his county. When this affidavit was sworn to, Kelly had been a notary public for a considerable time, but had not then caused such an entry to be made. It is contended that this invalidates the entire proceeding. The statute does not say that his acts shall be void if he fails to comply with the regulation. The public, executing papers before a notary public, are not required to investigate the records in the county clerk's office to find whether such an entry has been made, and it would be monstrous to hold that every act performed by or before a notary public who has failed to obey this statute is void, and thus invalidate legal proceedings and titles many years after the acts performed. Kelly was the solicitor for the complainant, and it is charged that therefore the affidavit is invalid and that the entire proceeding must fail. It is held in *Hollenbeck v. Detrick*, 162 Ill. 388, that while the practice of verifying papers in a cause before a notary who is an attorney therein is disapproved, yet it is not reversible error. The decree allowed an attorney's fee, pursuant to the mortgage, and it is contended that therefore Kelly, the attorney, was a party in interest, and for that reason the affi-

davit, sworn to before him, is invalid, and the decree, based upon said affidavit and publication thereunder, must be set aside, over eight years after it was entered. The decree did not direct defendants to pay Kelly any fee, but the entire sum found due, including the attorney's fee, was directed to be paid to the complainant, and the right of Kelly to a fee did not depend upon that provision of the mortgage or of the decree, but upon his contract with his client. We hold the attacks upon the affidavit not sustained by the law.

Sections 12 and 13 of the Chancery Act (J. & A. §§ 892, 893) required the notice of the pendency of the suit in such county to be published "in some newspaper printed in his county" at least once in each week for four successive weeks. The certificate of the publisher, filed in this case, certified that the notice in question was published four successive weeks in the Weekly Fair Dealer, the first insertion being on August 4, 1905, and the last on August 25, 1905, and this certificate was dated at Ottawa, Illinois. The service order found "that publications were duly made in the Fair Dealer, a paper of general circulation, published in the City of Ottawa, the first of said publications being made on the 4th day of August, 1905," and "that the publication was made for four successive weeks in the said Fair Dealer, the first publication being made more than 40 days prior to the first day of the present term." The order does not state that this publication was in LaSalle county, but we take judicial notice that Ottawa is in LaSalle county. Neither the certificate nor the service order say that the Fair Dealer is a newspaper, but only that it is a paper of general circulation, published at Ottawa, and it is argued that it might be a mere circular. We hold that as it is called in the certificate the Weekly Fair Dealer and as the service order finds that it is a paper of general circulation, published in the city of Ottawa, the meaning of all this is that it is a newspaper. It is also contended that neither the

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certificate nor the order show that it is "printed" in that county. We hold that the finding that it is published there is sufficient, and that if it were a fact that the paper was printed in Chicago and then sent to Ottawa and there published, as at least a part of newspapers having patent insides are printed, nevertheless its publication in Ottawa would satisfy the spirit of the requirements of the sections of the statute above referred to. It is worthy of note that section 1 of chapter 100 of the Revised Statutes, entitled "Notices" (J. & A. ¶ 7853), uses the word "published" instead of "printed."

It is contended that the proofs reported by the master did not justify a decree of strict foreclosure. The rule is that where the premises are worth no more than the mortgage debt, and the debtor is insolvent and the creditor is willing to take the property in satisfaction of the debt and the costs, it is proper to decree a strict foreclosure. *Wilson v. Geisler*, 19 Ill. 49, and other cases. The proofs preserved in the report of the master contain the evidence of a number of witnesses giving their opinions of the values of the several tracts of real estate described in this mortgage. Plaintiffs in error contend that, by making a computation of the values of the several tracts as named by these witnesses and dividing the result by eleven, it will be found that the value of the one-eleventh interest covered by said mortgage was \$334.53 more than the amount of this decree. This computation is not set out in the briefs and we have not verified it, but assume it to be true. In arguing that this shows that strict foreclosure should not have been awarded, several things are overlooked. The witnesses stated the value per acre of the entire tracts. It is obvious that a fraction thereof is worth less than the acre value of the entire property, for he who buys such a fraction subjects himself to his share of the expenses of a partition and will be compelled to accept any reasonable price bid, even if he

thinks it too small. Again, complainant testified before the master that the land mortgaged to him was worth no more than the indebtedness and the costs. Again, on the hearing of the motion made by plaintiffs in error, they showed that this land was subject to a life estate in the mother of Frank M. Higgins, and that she died December 12, 1913. It was also proved before the master that Higgins, the maker of the note, was insolvent. It is said that the \$100 solicitor's fee should not have been included in the decree because not asked in the bill. The mortgage provided that immediately upon filing a bill to foreclose it, \$100 solicitor's fee should become due to the complainant, and a copy thereof was filed with the bill as an exhibit and expressly made a part of the bill. The bill thus showed that a solicitor's fee of \$100 was due, and it prayed for a decree for what was due. We conclude the proofs warranted a decree of strict foreclosure.

In support of the motion plaintiff in error filed the affidavit of Frank M. Higgins. He therein stated that he never received notice in any way of the pendency of this suit and did not know that any proceedings had ever been had to foreclose said mortgage until December, 1913. He then stated for what matters the note was given, implying that the note was given for more than was due. His affidavit gives the dates and amounts of the several judgments which entered into this note, and the principal thereof amounts to \$87.53 less than the note. We have computed the interest on said judgments to the date of the note, and find that the note exceeds the principal and interest by less than \$24, and the affidavit does not state what the costs were in the several cases where said several judgments were recovered, so that it is obvious that the note was intended to be for the exact amount which Higgins owed on said judgments. The affidavit then sets up an entirely different agreement as to when and how this money should be paid, which agreement is said to have been made at the time when the note

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and mortgage were executed. All oral and prior contemporaneous arrangements are merged in the papers which the parties execute, and certainly Higgins cannot be heard now to show differently. The affidavit states that affiant's mother had a life estate in these premises, and agreed with him to pay the interest on this note, and that she did pay the interest thereon from year to year until she died, in December, 1913. He does not state that he was present and saw any interest paid, and he does not produce the affidavit of any other person who saw any interest paid, and his affidavit can only mean that he has been informed or believes that the interest was paid from year to year. In addition to all the reasons hereinbefore set out why such a claim cannot be received on mere motion more than eight years after the decree, the good faith and truth of this affidavit are much shaken by correspondence which defendant in error introduced in rebuttal to said affidavit. At the hearing of said motion Kelly, solicitor for defendant in error, had been called and examined as a witness for plaintiffs in error, and he thereupon further testified in behalf of defendant in error, producing copies which he testified to be true copies of letters written by him, which he testified he mailed, addressed to Frank M. Higgins at Geneva Lake, Wisconsin, and letters in reply thereto, which he testified he received from Higgins. These letters indicate that Kelly was a friend of Higgins and anxious to have him avoid the foreclosure. The correspondence began more than five months before this bill was filed, and Kelly therein repeatedly urged Higgins to pay the annual interest when due and informed him that McCormick would foreclose if he did not, and some time after the note was due wrote him that he had induced McCormick to wait fifteen days longer. Higgins' replies show that though these letters were addressed to "Geneva Lake" instead of "Lake Geneva," yet Higgins received them. Under

date of May 3, 1905, two days before the annual interest was due by the terms of the mortgage, Higgins wrote to Kelly: "I thought I could send a draft to-day for amt. of int. so delayed my reply to your letter. You will receive one next Monday or Tuesday at the latest." The printed letter heads upon which Higgins wrote these letters, and some of the letters themselves, show that he had an established business at Lake Geneva as the publisher of a newspaper there. Under date of August 6, 1905, the next day after the clerk mailed him the notice, Higgins wrote to Kelly: "I found that it was impossible for me to raise the interest money on that mortgage and as no one is losing anything but myself, I expect it is all right. Your client will find ample funds to reimburse him, and you, no doubt, will get your fee." After the decree was entered Kelly wrote Higgins telling him the amount of the decree and the time within which he could pay it, and urged him very strongly to make payment and save his land, if he thought it worth more than the decrec. In a letter which Higgins wrote to Kelly on August 14, 1906, nearly six months after the final order, he said among other things: "As to my keeping up the interest and preventing the foreclosure, it was simply impossible, so I will have to make the best of the situation as it is." With these letters in the record it is idle to say that he had no notice and has not been guilty of laches. But plaintiffs in error argue that it is not proven that Higgins wrote these letters and therefore the court should not have permitted them to be received subject to objection. Kelly did not testify in express words that the words "F. M. Higgins" signed to them were the genuine signature of Frank M. Higgins. But the letters written by Kelly show that he was well acquainted with Higgins, and he testified that he received these letters from Frank M. Higgins, and they contain such reference to the con-

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tents of the letters which Kelly wrote and mailed to Frank M. Higgins as to make it obvious that they are genuine letters of said plaintiff in error. Frank M. Higgins did not take the stand to deny that he wrote them.

We are satisfied that there is no reversible error in the decree and orders assailed by this writ of error. The decree and orders are therefore affirmed.

Affirmed.

**John Jacobson, Appellant, v. W. A. Patterson and
George Vanscoy, Appellees.**

Gen. No. 5,975.

1. SALES, § 186*—*effect of failure to take possession.* While a sale of personal property, where made in good faith and where all the terms were agreed upon, is valid so as to pass title without a delivery of such possession as the property is capable of, if the vendor retains possession the transaction is fraudulent as to creditors and subsequent purchasers without notice.

2. SALES, § 186*—*what constitutes an unreasonable time within which to take possession.* In an action of replevin against a sheriff and the constable, representing respectively an execution and attachment creditor, by a purchaser of the contents of a corncrib, held twenty-four days was not a reasonable time within which the purchaser should in some effective manner take possession of the corn, and that his purchase for value would not hold the property as against such creditors.

3. SALES, § 186*—*necessity for taking possession.* In an action of replevin by a purchaser of corn in a corncrib upon which he had made payments, where it appeared that the purchaser did not go to the corn, nor nail up the crib, nor post any notice of his purchase upon it, nor put a custodian in possession, nor take any of the corn away, held that he could not properly prevail as against the sheriff and constable representing, respectively, execution and attachment creditors.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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4. SALES, § 186*—*when question of reasonable time to take possession not for the jury.* The refusal of an instruction leaving to the jury the question whether a reasonable time had passed within which a purchaser should take possession of corn in a crib, and in determining what was a reasonable time the jury should take into consideration all the facts and circumstances shown by a preponderance of the evidence, was not erroneous since the evidence was such that the jury might not reasonably conclude that a reasonable time had not passed within which to take possession of the property.

5. APPEAL AND ERROR, § 1560*—*when refusal of requested instruction not prejudicial.* The refusal of an instruction that the actual delivery of corn in a crib was not necessary to pass title to a purchaser for value was not prejudicial, as there was no dispute as to the passing of title and the instruction was unnecessary.

Appeal from the Circuit Court of Livingston county; the Hon. G. W. PATTON, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 13, 1914.

BERT W. ADSIT, for appellant.

NORTON & ORTMAN and P. A. GIBBONS, for appellees.

MR. JUSTICE DIBELL delivered the opinion of the court.

Rowe, in Livingston county, is on a railroad. Jacobson had an elevator there and bought grain. Noonan owned a farm variously stated by the witnesses to be three and one-half and eight and one-half miles from Rowe. Chronister was a tenant, working this farm on shares. Jacobson bought Chronister's oats in the summer of 1912 and paid him therefor and advanced him \$153 in addition. Noonan and Chronister divided the corn in the field that fall. Noonan had a double crib, containing a west half and an east half. Chronister's corn was put in the west half of the crib. On December 13, 1912, Chronister came to Jacobson at Rowe and wished to sell his crib of corn to Jacobson. Jacobson offered him 40½ cents

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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per bushel. The offer was accepted and Jacobson bought the corn and paid Chronister \$200 thereon and they agreed that the \$153 should be applied thereon. Jacobson said his crib contained about 1,400 bushels. Jacobson was short of cars at the time and it was arranged that when he did get a car Chronister was to haul in the corn and deliver it at Rowe, and then receive the balance of the purchase money. On Friday, January 3, 1913, Chronister called upon Jacobson at Rowe and inquired when he would be ready to take the corn. Jacobson had since bought Noonan's corn and he wished to get another car and have all the corn delivered at the same time, and he told Chronister that he thought he would have two cars soon. Between that time and the 5th, Chronister abandoned his family and absconded. Certain creditors of Chronister obtained judgments against him and placed executions in the hands of Patterson, the sheriff, on January 6th, and another creditor sued out an attachment before a justice and placed it in the hands of Vanscoy, a constable. Patterson levied upon this crib of corn on the evening of January 6th, and thereafter Vanscoy took steps to acquire a lien, subject to the sheriff's executions, all on January 6th. Patterson appointed Ogden, a farmer living near by, as his custodian. On the 7th, Jacobson undertook to send word to Chronister to haul in the grain and then learned of the levy under the executions and attachment. He demanded the corn from the sheriff and from the constable and was refused and brought this action of replevin against them for said corn. There was a declaration of four counts, and many pleas and replications. No question arises upon the pleadings. There was a jury trial and a verdict for the defendants and a judgment for the return of the property replevied and costs, and plaintiff appeals.

The good faith of the transaction between Jacobson and Chronister was admitted at the trial, and as be-

tween those parties the sale was complete and the title to the corn passed from Chronister to Jacobson. Jacobson did not take either actual or constructive possession. He never saw the corn until after it was levied upon by the sheriff. He did not appoint any custodian of the corn nor nail up the crib nor post any notices thereon that he was the owner. He left the corn absolutely in the possession of Chronister. When the sheriff levied, the corn had been in that crib for twenty-four days after Jacobson bought it and paid most of the purchase price, without anything being done to indicate to creditors or purchasers that it was not still owned by Chronister. It might be thought from the record that the sheriff did nothing towards taking possession under his executions, except to appoint Ogden custodian, were it not that at the trial the attorney for the plaintiff admitted that Ogden was in the custody of the corn until the coroner took it under plaintiff's replevin writ.

It is the well-settled law of this State that a sale of personal property, where made in good faith and where all the terms are agreed upon, is valid and the title passes without a delivery of possession such as the property is capable of, but that if the vendor retains the possession the transaction is fraudulent as to creditors and subsequent purchasers without notice.

In *Thompson v. Yeck*, 21 Ill. 73, Thompson bought personal property at a chattel mortgage sale and left it in possession of the mortgagors until it should be called for under a written agreement. A creditor of the mortgagors attached it. It was held that for want of a change of possession the transaction was legally fraudulent and not open to explanation, and that the property was subject to the attachment. In *Dexter v. Parkins*, 22 Ill. 143, personal property was left in the possession of the vendor and was levied upon by a constable for his debt. The vendee claimed the property. It was held that the possession of the vendor

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was an absolute fraud. To the same effect are *Corgan v. Frew*, 39 Ill. 31, and *Foley v. Boyer*, 153 Ill. App. 613. In *Reese v. Mitchell*, 41 Ill. 365, a mortgagee lived seven miles from the personal property mortgaged. Two days after the maturity of the debt the property was still in the possession of the mortgagor, and was seized on an execution in favor of a creditor of the mortgagor. The mortgagee replevied. It was held that one day was a sufficient time after the maturity of the debt to take possession, and that the possession of the mortgagor on the second day was fraudulent as to creditors. In *Frost v. Woodruff*, 54 Ill. 155, it was held that if the sale was in good faith, the property might remain with the vendor any length of time, if the vendee took possession before any lien attached to it while in the hands of the vendor. In *Burnell v. Robertson*, 10 Ill. (5 Gilm.) 282, it was held that in case of two sales of the same personal property, he has the better right who first gets possession, and that an attaching creditor is to be protected as a purchaser. In *Thompson v. Wilhite*, 81 Ill. 356, growing grain was sold. A day or two after it was cut an execution against the vendor was levied upon it. It was held that no further possession could be taken by the buyer until it was cut, and that the buyer had not then had time to remove it and that he should be given the grain. Hogs were sold at the same time and the vendee hired the vendor to feed them and left them on the vendor's farm. It was held that the retention of the hogs by the vendor, though in good faith, was fraudulent in law as to creditors and purchasers. In *Ticknor v. McClelland*, 84 Ill. 471, there had been a sale of standing corn, stacks of hay, hogs, etc. The sale was made on September 23rd at a distance of eighteen miles from the property. The buyers lived sixteen or eighteen miles from the property. They examined the property on September 24th and the hogs were turned into a pasture on the seller's farm to be fed by the seller. A

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bill of sale was made on September 25th. An execution against the seller was issued on September 27th and levied on this property on September 29th, six days after the original sale. The purchaser replevied. It was held that a sale of personal property is fraudulent as to creditors and purchasers where the seller continued in possession; that the buyer was not required to take manual possession of growing crops until the time to harvest them; and that there need not be a manual delivery of ponderous goods, incapable of being handed from one to another, and that in that case the delivery was sufficient as to the standing corn and the stacks of hay, and that, as to the rest of the property, the sale was fraudulent in law because of the failure to deliver possession, and void as to creditors, and subject to the execution. In *Wellington v. Heermans*, 110 Ill. 564, it was said that, "the title to chattels or choses in action does not pass by sale or gift, as to creditors or purchasers, unless accompanied by possession, either actual or constructive." In *Huschle v. Morris*, 131 Ill. 587, it was held that delivery is not necessary to pass the title as between the parties to an unconditional sale, but that it is necessary to make it valid as to creditors and bona fide purchasers. *Martin v. Duncan*, 156 Ill. 274, was a case of a stock of goods in a store, levied upon by attachment against a vendor after a sale. It was held that there should have been a change of possession, indicated by such outward, open, actual and visible signs as could be seen and known to the public or persons dealing with the goods, in order to permit the sale to prevail over the attachment. It is therefore clearly the law in this State that the sheriff, representing the execution creditor, should prevail in this case, unless the buyer was excused from taking possession by the ponderous nature of the crib of corn or by the circumstances in the case.

In *Hart v. Wing*, 44 Ill. 141, a case of corn in a crib, it was held that the actual removal of the entire mass

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of corn was not necessary to constitute a delivery and change the possession. It was held that such possession was given in that case as the nature of the property permitted, but the report of the case does not show what was done to effect a delivery. In *Richardson v. Rardin*, 88 Ill. 124, the question was whether a constable had made a sufficient levy upon certain corn in the crib. The constable made the levy in actual view of the property and properly indorsed it upon his execution. The defendant was at the crib. The execution was served upon him. Demand was made that he turn over the property and this he refused. He was notified that a levy was made upon the corn, and that he must not further interfere with it. The constable then nailed boards on the crib, so as to secure the corn, and then gave public notice in the hearing of several persons standing near that he had levied upon the corn and it must not be disturbed. Richardson claimed to have bought the corn long before that time, and the court held that, even if he had bought it of the execution debtor, there was not such a delivery to Richardson and possession taken by him as would bind third parties without actual notice. Afterwards, the constable notified Richardson that he had levied on the corn. After that, Richardson took the corn away with knowledge of the levy. It was held that the constable did that which, but for the protection of his writ, would have made him a trespasser, not only in nailing the boards on the crib but also in exercising actual dominion over it and prohibiting its use by the defendant in execution and others. It was said that it would have been better if the constable had also placed a notice on the crib that the corn was levied upon, but that this was not necessary as to Richardson, since he had actual notice of the levy before he took the corn away. In *May v. Tallman*, 20 Ill. 443, where a crib of corn was sold and the purchaser took away two loads and the seller refused to permit the rest

to be taken, and the buyer brought trover and recovered and that was sustained, it was said that even where a strict delivery was necessary, the actual removal of the entire mass of a cumbersome article, like a crib of corn, is not necessary to constitute a delivery and change of possession.

Under the above authorities we conclude that as Jacobson did not go to the corn, did not nail up the crib, did not post any notice of his purchase upon it, did not put a custodian in possession and did not take away any of the corn, it must be held that he did nothing towards taking possession, and that twenty-four days was not a reasonable time within which he should in some effective manner take possession, and that his purchase would not hold the property as against the execution creditors. The court refused an instruction, leaving the jury to determine whether a reasonable time had passed within which he could take possession of the corn, and that in determining what was a reasonable time the jury could take into consideration all the facts and circumstances shown by a preponderance of the evidence. This instruction should have been given if there had been any evidence from which the jury might reasonably conclude that a reasonable time had not passed within which to take possession of the property. Jacobson testified that after his conversation with Chronister on January 3rd about bringing in the corn and Noonan's corn at the same time, he thought he did not get a car until January 7th, but he did not testify that after buying the corn on December 13th he made an effort to get a car nor that he did not have cars during that time, nor was it shown that he could not have received the corn in his elevator. Jacobson testified that when he went out with the coroner to serve the writ of replevin, which was January 17th, the roads were muddy and corn could not be hauled, but there was no evidence that anything in the condition of the roads interfered with the hauling

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of the corn from December 13th to January 6th. We therefore conclude that the jury could not reasonably have found from the evidence that a reasonable time had not elapsed for Jacobson to take possession of the corn before executions were levied, and that the refusal of that instruction did not harm the plaintiff. Some other instructions requested by plaintiff were refused which might have been given, such as that the actual delivery of the corn was not necessary to pass the title from Chronister to Jacobson, but it was not disputed that as between these parties the title did pass, and the instruction was unnecessary. In *Walsh, Boyle & Co. v. First Nat. Bank of Hiawatha*, 228 Ill. 446, there is language implying that an attaching creditor only takes the rights the debtor has in the property at the time of his levy and is not entitled to be protected as a bona fide purchaser for value, and that statement is found in some earlier cases; but in the case just cited there had been a transfer of a bill of lading, and this was held to be a symbolical and sufficient delivery of the carload of flour there involved, and this delivery was before the levy, and, the property having been delivered, a subsequent attachment could not take the property. In many of the cases we have above cited, execution creditors and attaching creditors were coupled together as each entitled to hold property seized where there had not been a sufficient delivery of possession to another.

We conclude that the judgment is right as to both sheriff and constable, and it is therefore affirmed.

Affirmed.

Oliver Wing, Appellee, v. E. M. Smith, Appellant.
Gen. No. 5,930.

1. MASTER AND SERVANT, § 158*—*application of Safety Appliance Act.* Act of 1897 (Hurd's R. S. 1913, ch. 48, §§ 43-48, J. & A. ¶¶ 5378-5383) *held* not to apply to the injury in question, as sought to be guarded against by the statute.

2. MASTER AND SERVANT, § 158*—*persons protected by Safety Appliance Act.* To entitle a person to recover because of a violation of a statute imposing a duty upon an employer for the protection of an employee, he must be within the class contemplated by the statute and within the purpose and protection for which the law was enacted.

3. MASTER AND SERVANT, § 572*—*burden of proof.* In order to entitle an employee to recover under a statute enacted for the protection of workmen, it is not alone sufficient to aver and prove the violation of the statutory duty of the defendant and the consequent injury to the plaintiff, but it must also appear that the statutory duty violated was one that defendant owed the plaintiff and of which he complains.

4. INSTRUCTIONS, § 25*—*where counts are defective.* Refusal of an instruction to the jury to disregard certain bad counts is not reversible error if there is another good count in the declaration.

5. MASTER AND SERVANT, § 158*—*safety appliance statute construed.* Act of 1909 (Hurd's R. S. ch. 48, §§ 89 *et seq.*, J. & A. ¶¶ 5386 *et seq.*) *held* that the purpose of the act manifest from its title and provisions was to provide for guarding power driven machinery and that it was not intended to limit its requirements to machines specifically named and hence it should be construed to cover buffing wheels, as there was not an attempt to name every machine or part of a machine that must be guarded, but rather the specific mention of certain machines to indicate the kind and character of machinery contemplated.

6. MASTER AND SERVANT, § 445*—*compliance with direction of master.* A workman is not to be charged with negligence, or with the performance of an unlawful act, because he installs or works upon machinery not guarded in compliance with statute, if he does so under the direction of his master.

7. MASTER AND SERVANT, § 432*—*care required of servant to use safety devices.* It seems that if a workman is in charge of the installation and operation of a machine, with full power to guard

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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it or not as he sees fit, he cannot maintain an action for negligence of his master based on his own failure to do the act required.

8. INSTRUCTIONS, § 38*—*when recital of inapplicable part of statute reversible error.* An instruction reciting sections of an act not applicable, *held* prejudicial as presenting improper matters for consideration in reaching a verdict.

9. MASTER AND SERVANT, § 302*—*where doctrine of assumed risk does not apply.* In an action under the Act of 1909 (Hurd's R. S. ch. 48, §§ 89 *et seq.*, J. & A. ¶¶ 5386 *et seq.*), *held* that an instruction that the doctrine of assumed risk did not apply and the doctrine of contributory did apply was proper under the pleadings, although both defenses may not be available under the statute.

10. INSTRUCTIONS, § 38*—*effect of recital of lengthy statute.* While the recital of an extensive statute in an instruction is not good practice, it was *held* not to be erroneous.

11. MASTER AND SERVANT, § 685*—*admissibility of evidence.* Where an injury fell within the Safety Appliance Act of 1909, it was *held* erroneous to permit the introduction of evidence that other machinery in the factory was not guarded, including machinery that might fall within the provisions of the Act of 1897, which did not apply to the injury in question.

Appeal from the Circuit Court of Peoria county; the Hon. THEODORE N. GREEN, Judge, presiding. Heard in this court at the April term, 1914. Reversed and remanded. Opinion filed October 27, 1914.

PAGE, HUNTER, PAGE & DALLWIG, for appellant.

DAILEY & MILLER, for appellee.

MR. PRESIDING JUSTICE CARNES delivered the opinion of the court.

Appellee, Oliver Wing, met with an accident April 16, 1912, while in the employ of E. M. Smith, the appellant, resulting in the loss of his left eye. He brought this action on the case to recover for the injury. A jury trial resulted in a verdict and judgment against appellant for forty-five hundred dollars, and he brings the case here for review.

Appellee is a skilled mechanic and had been in the employ of appellant for about ten years before the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

accident. At the time of the injury he was in charge of three men helping him to do a piece of work. It is not clear from the evidence what his position in the shop was. Appellant's counsel say he was foreman, and appellee's counsel say that he was acting under the direction of appellant and simply in charge of the men that were helping him do the particular work on which they were engaged at the time of the injury. They were making a floor plate in the course of some repair work on an automobile. A short time before the accident appellee went to a dealer in buffing wheels and procured a wheel about ten inches in diameter and about an inch thick made of pieces of canvas stitched together. On the day of the injury appellee himself, or one of his helpers under his direction, attached this wheel to the stand or frame on which it was used at the time of the injury. It was connected by a belt with a line shafting in the shop and revolved very rapidly. The helper under appellee's direction attempted to polish or buff the floor plate by holding it against the wheel as it revolved. It flew out of the helper's hands, and appellee took it and held it against the revolving wheel when it flew from his hands and struck him in the left eye.

The case was tried on a declaration of three original and two amended counts and a plea of the general issue. The first count charged a violation of the Act of 1897 (J. & A. ¶ 5379) in failure to provide a hood or hopper on said wheel, and averred due care by plaintiff; the second count charged that the wheel was not guarded and had no hood or hopper as provided by the Act of 1897; the third count is substantially the same as the second; each of the last two counts omitted the averment of due care by the plaintiff. The first amended count charged a failure of appellant to inclose, fence, cover or protect the "combination emery and buffing wheel" by a guard or device as required by the Act of 1909; the fifth count is the same as the

fourth except the wheel is called an emery wheel. In each of the two amended counts due care by the plaintiff is alleged.

The Act of 1897 is found in Hurd's Revised Statutes of 1913, ch. 48, p. 1183, and in Jones & Addington Annotated Statutes, vol. 3, p. 2894, ¶ 5378. It is entitled: "An Act to compel the using of blowers upon metal polishing machinery," and is sometimes called the "Blower Act." It provides: "That all persons * * * operating any factory or workshop where emery wheels or emery belts of any description are used, either solid emery, leather, leather covered, felt, canvas, linen, paper, cotton, or wheels or belts rolled or coated with emery or corundum, or cotton wheels used as buffs, shall provide the same with blowers, or similar apparatus, which shall be placed over, beside or under such wheels or belts in such a manner as to protect the person or persons using the same from the particles of the dust produced and caused thereby, and to carry away the dust arising from or thrown off by such wheels or belts while in operation directly to the outside of the building or to some receptacle placed so as to receive and confine such dust. * * *"

It is made the duty of any person operating such factory or workshop to provide such appliances, etc., "necessary to carry out the purpose of this act, as set forth in the preceding section," and that "each and every such wheel shall be fitted with a sheet of cast iron hood or hopper of such form and so applied to such wheel or wheels that the dust or refuse therefrom will fall from such wheels, or will be thrown into such hood or hopper by centrifugal force and be carried off by the current of air into a suction pipe attached to same hood or hopper." (J. & A. ¶ 5379.) The size of the suction pipe on various sized wheels is provided for, and necessary fans or blowers to be connected therewith, and the speed at which the fans shall be run.

The Act of 1909 (in force January 1, 1910) is found

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in Hurd's Statutes on page 1198, and in the third volume of J. & A. Statutes on page 2896, ¶ 5386, and is entitled: "An Act to provide for the health, safety and comfort of employees in factories, mercantile establishments, mills and workshops in this State, and to provide for the enforcement thereof." It provides: "That all power driven machinery, including all saws, planers, wood shavers, jointers, sand paper machines, iron mangles, emery wheels, ovens, furnaces, forges and rollers of metal; all projecting set screws on moving parts; all drums, cogs, gearing, belting, shafting, tables, fly wheels, flying shuttles and hydro-extractors; all laundry machinery, mill gearing and machinery of every description; all systems of electrical wiring or transmission; all dynamos and other electrical apparatus and appliances; all vats or pans, and all receptacles containing molten metal or hot or corrosive fluids in any factory, mercantile establishment, mill or workshop, shall be so located wherever possible, as not to be dangerous to employes or shall be properly enclosed, fenced or otherwise protected. All dangerous places in or about mercantile establishments, factories, mills or workshops near to which any employe is obliged to pass, or to be employed shall, where practicable, be properly enclosed, fenced or otherwise guarded. No machine in any factory, mercantile establishment, mill or workshop, shall be used when the same is known to be dangerously defective, and no repairs shall be made to the active mechanism or operative part of any machine when the machine is in motion." The violation of this act is made a misdemeanor punishable by fine.

It is obvious that the purpose of the Act of 1897 was to protect workmen from dust, and that there was no intention to protect from the kind of accident that occurred in this case. It is quite likely that the act could have been complied with and still left the machinery in such condition that this accident would

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have happened. But if there was a causal relation between the failure to comply with the Statute of 1897 and the injury, we are still of the opinion that the injury was not one sought to be guarded against by the provisions of that statute, and therefore that appellee could not make a case by showing its violation by appellant. To entitle a plaintiff to recover because of a violation of a statute imposing a duty on the defendant, he must be within the class contemplated by the statute, and within the purpose and protection for which the law was enacted. *Rosan v. Big Muddy Coal & Iron Co.*, 128 Ill. App. 128; *Halberg v. Citizens Coal Min. Co.*, 149 Ill. App. 412. It is not sufficient to aver and prove the violation of a statutory duty by the defendant, and consequent injury to plaintiff, but it must further appear that the statutory duty violated was one that the defendant owed the plaintiff. *Ehrlich v. Chicago Great Western R. Co.*, 160 Ill. App. 379, and authorities there cited and reviewed. Definitions of negligence by courts and text writers are numerous and not altogether harmonious. A great number of them are found in 29 Cyc. 415. Our Supreme Court in *McAndrews v. Chicago, L. S. & E. Ry. Co.*, 222 Ill. 232, on page 236, stated the three elements necessary to make a case of actionable negligence. The first element being in the language of the court: "The existence of a duty of the part of the defendant to protect the plaintiff from the injury of which he complains." The definition of actionable negligence there stated has been much quoted in later cases in this State. Under that definition the duty of a defendant to protect the plaintiff from an injury is not sufficient; it must be a duty to protect the plaintiff from "the injury of which he complains." The duty may be created by statute or ordinance or may otherwise arise, but if it be created by statute the consequences must be those contemplated by the provision. 29 Cyc. 438. It is said in 21 Am. & Eng. Encyc. of

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Law 481: "It is believed that as a general rule evidence of the violation of a statute or ordinance can tend to show actionable negligence only where the consequences particularly or generally contemplated by the provision in question have ensued from its violation."

No attempt is made to sustain either of the three original counts except on the claim that the Statute of 1897 applies. In our opinion they were each bad in failing to charge actionable negligence. Appellant at the close of plaintiff's case, and again at the close of all the evidence, offered a separate motion accompanied by an appropriate instruction asking the court to instruct the jury to disregard these counts, which motions were denied and the instructions refused. The instructions should have been given, but if there were other good counts or another good count in the declaration, it was not reversible error to refuse them. *Scott v. Parlin & Orendorff Co.*, 245 Ill. 460.

Appellant contends that the Act of 1909 does not apply because, though the section begins by using the words "all power driven machinery," it follows immediately with the words, "including all saws, planers," etc., and a buffing wheel is not included among the many kinds of machinery specifically mentioned; and the rule of construction that words of general import are limited by words of restricted import immediately following or preceding is invoked. He contends that it was the intent of the lawmaker to provide for guarding emery wheels, because they are specifically mentioned, and not to provide for guarding buffing wheels because they are not so mentioned. We are of the opinion that the purpose of the act manifest from its title and provisions is to provide for guarding power driven machinery, and that it was not intended to limit its requirements to machines specifically named, and that it should be read to cover buffing wheels; that there was not an attempt to specifically

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name every machine or part of a machine that must be guarded, but rather by the specific mention of certain machines to indicate the kind and character of machinery contemplated. We assume there are machines of other names, but of the same character, now in use, and that from time to time still other machines, now unknown and unnamed, of the same character, will be operated in factories; and we think it a too narrow construction of this act to hold it applies to no machine not specifically mentioned therein. In *Streeter v. Western Wheeled Scraper Co.*, 254 Ill. 244, 1 N. C. C. A. 828, the Court said, in discussing this act, on page 247: "Section 1 is an unqualified declaration that all machinery and appliances of the *character* mentioned shall," etc.; and while the Court was not then discussing the question we are now considering, still the language used is some indication of its construction of the statute in that regard.

The first additional count charges a failure to guard "a power driven combination emery and buffing wheel," and the second additional count describes it as "an emery wheel." We are of the opinion that the evidence may be read as supporting the first designation, if not the second.

It is contended that appellee was acting at the time as a vice-principal and was solely responsible for the installation and operation of the wheel. As we have before said, it is not clear from the evidence just what position of responsibility appellee occupied, either generally or in relation to this transaction. As the case must be remanded for another trial, and the evidence on that trial will probably more clearly show these facts, we will not discuss that feature further than to say that a workman is not to be charged with negligence, or with the performance of an unlawful act, because he installs or works upon machinery not guarded in compliance with the statute, if he does so under the direction of his master; but we assume it

is true that if the workman is in charge of the installation and operation of the machine, and the question whether it be guarded is left to his discretion, and he has full power and authority to guard it or not as he sees fit, that he cannot maintain an action for negligence of his master based on his own failure to do the act required.

The court at the instance of appellee gave the jury an instruction reciting the first and second section of the Act of 1897, and by another instruction led them to infer that appellant was under a duty to appellee to comply with that act, and that a failure to do so created a liability in this case. This in our opinion was prejudicial error. It may be said that it could make no difference because the duty to guard the machine was imposed by the Act of 1909, and it was only necessary that the jury should know that the duty existed, and not material whether it was imposed by one statute or two; but it is probable that a mistaken belief that the machine was operated in violation of the Act of 1897 as well as the Act of 1909 would prejudice the jury against the defendant and affect their verdict. This consideration is of more importance because of the fact that in this class of cases the question of the amount of damages is necessarily largely left to the discretion of the jury and may be influenced unconsciously by feelings of prejudice. Whether appellant had violated the Statute of 1897 was not a question for the jury in this case, and they should not have been embarrassed by its consideration.

It is argued by appellee that there is no question of contributory negligence or assumed risk in this case, and *American Car & Foundry Co. v. Armentraut*, 214 Ill. 509, and *Streeter v. Western Wheeled Scraper Co.*, *supra*, are cited in support of that contention. The former case arose under the Child Labor Law. The defense of contributory negligence is not available under that law or under the Mining Act for reasons

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that are not necessarily controlling in cases arising under this Statute of 1909. It was not held in the *Streeter* case, *supra*, which arose under the Act of 1909, that it was unnecessary to aver and prove due care on the part of the plaintiff. We are not aware that the question has been determined by the Supreme Court. We indicated in *Robishaw v. Schiller Piano Co.*, 179 Ill. App. 163, that the question was in doubt, and the Appellate Court of the First District in *Schultz v. Henry Ericsson Co.*, 182 Ill. App. 487, use some expressions in discussing the question of contributory negligence that may be taken as indicating that the defense is like that of assumed risk, not available under such a statute. In each of the amended counts due care is alleged. The court instructed the jury that the doctrine of assumed risk did not apply and the doctrine of contributory negligence did apply. Under the pleadings this instruction was proper and no cross-error is assigned raising the question.

The court at the instance of appellee recited in an instruction the section of the Act of 1909, heretofore set out. This is argued as error. While it is no doubt better to instruct a jury in such a case as to the liability of the defendant without reciting a statute so extensive as this one, at length, still we do not regard the instruction as reversible error. It is however open to the objection that it directs the attention of the jury to other and different elements of liability and might thus confuse them, and should not be repeated on another trial. The court properly refused to instruct the jury that the doctrine of assumed risk applied; the *Streeter* case, *supra* is decisive of that question. Other questions arising on the instructions are sufficiently disposed of in what we have heretofore said. Appellee was permitted over the objection of appellant to introduce evidence that other machinery in the factory was not guarded, including machinery that might fall within the provisions of the Act of

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1897. This was error that might prejudice the jury against appellant. Complaint is made that witnesses in some instances were permitted to testify to conclusions instead of facts, and there is some ground for the complaint, but that question may not arise in another trial.

For the reasons indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

**Louis Giachas, Appellee, v. The Cable Company,
Appellant.**

Gen. No. 5,937. (Not to be reported in full.)

Appeal from the Circuit Court of Kane county; the Hon. MAZZINI SLUSSER, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 27, 1914. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Louis Giachas against The Cable Company for compensation for the loss of an arm under the Act of 1911, since repealed. From a judgment for \$1,749.90, in favor of the plaintiff, defendant appeals.

Plaintiff was an unmarried Russian, twenty-three years of age, who had been in the country about three years and employed by the defendant in the same grade of employment for one year, earning wages amounting to \$509.95. On January 23, 1913, he sustained an injury arising out of and in the course of his employment, and he was unable to do any work until July 25, 1913. As a direct result of the injury his right arm was amputated two-thirds of the way from the elbow to the wrist. A subsequent amputation was necessary resulting from blood poisoning, and although it caused much sickness and pain, his general

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health was good at the time of the trial, when there was still some soreness in the stump, which promised to become serviceable in from three to six months from the date of the hearing.

RALPH F. POTTER, for appellant.

CHARLES B. HAZLEHURST and GEORGE D. CARBARY, for appellee.

MR. PRESIDING JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. WORKMEN'S COMPENSATION ACT, § 1*—*construction*. Where the trial court *held* at the instance of an employer that there could be no recovery under clause C of the Compensation Act of 1911 (Hurd's R. S. 1913, ch. 48, § 126, J. & A. ¶ 5449), but recovery must be had, if at all, under clauses b and d, the employer cannot, and did not in the case at bar, question that basis of computing damages.

2. WORKMEN'S COMPENSATION ACT, § 7*—*effect of offer of employment*. In an action for the loss of an arm under a compensation act, where the claimant is still unemployed but was offered employment by defendant, but not permanent or for any definite period, such an offer pending litigation is not entitled to much weight on the question of probable future earnings.

3. WORKMEN'S COMPENSATION ACT, § 8*—*amount of award*. Where under clause d of the Compensation Act of 1911 (Hurd's R. S. 1913, ch. 48, § 126, J. & A. ¶ 5449) the time on which to compute recovery is practically seven and one-half years, the rate is \$709.95 a year, the amount to be earned on that basis is \$3,824.53, half of which is \$1,912.26, a finding of the court for \$1,749.90, which was reached by deducting from the sum of \$1,912.26, what in the opinion of the court plaintiff would be able to earn in some suitable employment or business after the accident in that period of seven and a half years, and adding to the amount so obtained the sum due under clause b; and whatever defendant might be found liable for on the doctor's bill of \$225, stipulated to be reasonable, will not be disturbed by an Appellate Court, as it is peculiarly a case where the judgment of the trial court, who had the man before it, should stand, unless clearly wrong, since the question of probable future earnings leads into the field of conjecture and speculation.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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4. WORKMEN'S COMPENSATION ACT, § 7*—*elements of compensation*. Evidence as to pain and suffering of a petitioner for compensation for the loss of an arm, although it probably should have been excluded had it been a jury trial, *held* not prejudicial in a trial to the court.

5. WORKMEN'S COMPENSATION ACT, § 8*—*future earning capacity in arriving at award*. In an action under a compensation act for loss of an arm, where the court refused to hear the testimony of one-armed men produced by defendant as to how they had prospered despite the disability, and heard testimony introduced by plaintiff, over objection, to the effect that the loss of an arm is a serious disadvantage in the business world in obtaining employment, *held* not to be erroneous in excluding the first, and if erroneous in admitting the second, it was of no consequence in influencing the court's finding, as what a one-armed man may do is a matter of common knowledge.

**Clotilde Machelli, Appellee, v. Silvester Torrelli,
Appellant.**

Gen. No. 5,967. (Not to be reported in full.)

Appeal from the Circuit Court of Bureau county; the Hon. JOE A. DAVIS, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 27, 1914.

Statement of the Case.

Replevin by Clotilde Machelli against Silvester Torrelli to recover the possession of a horse. Plaintiff's husband had traded the horse to defendant for another. From a judgment on a verdict in favor of the plaintiff, defendant appeals.

It was contended that plaintiff's testimony, that she obtained the money from her deceased father's estate with which she purchased the horse, was unreasonable, inconsistent with itself and should be disregarded, and that she probably obtained the money from her husband who earned wages as a laboring man.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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WALTER A. PANNECK, for appellant.

WATTS A. & CAREY R. JOHNSON, for appellee.

MR. PRESIDING JUSTICE CARNES delivered the opinion of the court.

Abstract of the Decision.

1. REPLEVIN, § 40*—*what constitutes demand and refusal of property.* Where a claimant told one in possession of a horse that she was going to the pasture and take the horse, and he answered if she did it would cost her dear, the conversation amounted to a demand and refusal upon which a replevin action might be based.

2. APPEAL AND ERROR, § 481*—*when rulings on motion for peremptory instructions not preserved for review.* Where the trial court refuses defendant's motion for a peremptory instruction at the close of plaintiff's evidence, and again at the close of all the evidence, defendant waives the first error by introducing evidence in defense after the overruling of his motion, and as he did not tender the written instruction asked at either time, he cannot raise the question on appeal.

3. REPLEVIN, § 124*—*insufficiency of evidence for directed verdict.* In an action of replevin, evidence held insufficient to require a directed verdict for defendant even if properly made.

4. NEW TRIAL, § 127*—*necessity for weighing evidence.* In passing on a motion for a new trial a court is required to weigh the evidence, although not so required in passing upon a motion for a directed verdict.

5. REPLEVIN, § 124*—*sufficiency of evidence.* In a replevin suit, evidence held sufficient to support the verdict of right of property in plaintiff.

6. ESTOPPEL, § 50*—*evidence insufficient to show ratification.* Where the evidence was conflicting as to where and how plaintiff learned of her husband's trading a horse, held insufficient to show ratification of the transaction.

7. REPLEVIN, § 147*—*effect of omission of elements in instructions.* Where at the instance of defendant the jury were instructed that the only question involved in the case was whether or not at the time plaintiff's husband and the defendant traded or exchanged horses—the plaintiff in the case was the owner and was entitled to the possession of the horse in controversy, and that the burden of proof was on her to establish that fact, he was not in a posi-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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tion to complain that the jury ignored or mistook other questions of fact, such as demand before the replevin action was instituted or ratification of the trade after it was made.

8. REPLEVIN, § 126*—*sufficiency of evidence to show demand*. In an action of replevin of a horse, evidence held to show a demand for the property and a refusal by the defendant to deliver before institution of suit.

**Daniel Dinneen, Appellee, v. Edgar F. Bradford et al.,
Appellants.**

Gen. No. 5,971.

1. OFFICERS, § 62*—*right to salary when prevented from performing duties*. If an officer is wrongfully prevented from doing the duties of his office he may recover his salary during the time it was so prevented, where it has not been paid to anyone performing the duties of the office.

2. OFFICERS, § 62*—*right to salary where another has received compensation for performing the duties of office*. Where any one else has been paid for performing the duties of an officer during the absence of the incumbent, it is the prevailing rule that the incumbent cannot recover such salary from the municipality.

3. OFFICERS, § 62*—*right to compensation as affected by neglect of duties*. Though the conduct of an officer may be such as to render him liable to removal, if the statute makes no deductions for absence or neglect of duty and the State takes no steps as to the consequence of such absence or delinquency, it is the legal right of the officer to demand the full salary allowed by law.

4. OFFICERS, § 68*—*when mandamus will not lie to compel payment of unaccrued salary*. Where a petition, praying for a writ of mandamus directing the city counsel to vote the payment of salary to a commissioner for certain months alleged to be due at the filing of the petition and also the issue of warrants for the monthly instalments of a salary in the future while he should hold office, went to judgment upon demurrer to answer and pleas and the court could not from them judicially know that the petitioner had any right to be paid or had not been paid for the months subsequent to the filing of the petition, the judgment could only be

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.
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properly affirmed as to the months alleged to be due at the time of the filing of the petition, without prejudice to the right of the petitioner to institute suit for instalments accruing thereafter.

Appeal from the Circuit Court of La Salle county; the Hon. JOE A. DAVIS, Judge, presiding. Heard in this court at the April term, 1914. Affirmed in part and reversed in part. Opinion filed October 27, 1914.

RECTOR C. HITT, for appellants.

BROWNE & WILEY and JAMES J. CONWAY, for appellee.

MR. JUSTICE DIBELL delivered the opinion of the court.

On March 7, 1913, Daniel Dinneen filed in the Circuit Court of La Salle county a petition against Edgar F. Bradford and four others for a mandamus. The petition charged that the city of Ottawa is under the commission form of municipal government; that in 1911 petitioner was duly nominated and elected and qualified as a commissioner of said city, and Bradford in like manner became mayor, and three of the other defendants also became commissioners, and the remaining defendant became city clerk, and that the mayor and petitioner and the other three commissioners entered upon the duties of their offices, and that from that time until the filing of the petition, Bradford continued to hold and occupy the position of mayor and petitioner and said other three defendants continued to hold and occupy the office of commissioner; that none of them has in any way resigned or abdicated his office or been recalled or been displaced or disqualified in any way by any court, or in any other way deprived of full participation in said office to which he was so elected, and that said mayor and said commissioners constitute the council of said city, and that no one has disputed said facts or the right of said parties to enjoy and administer said offices. The petition further alleged that when said parties were in-

ducted into said offices, the population of said city was between 10,000 and 15,000, and that under said statute the salary of each commissioner was fixed at \$900 per year, payable in equal monthly instalments, and that the salary of petitioner was \$75 per month and he was entitled thereto; that the manner provided for paying said salaries was that the city council by vote allow the salary of each officer each month and direct warrants issued upon the city treasurer for said amounts; that said warrants are then signed by the mayor and city clerk and delivered to the persons respectively entitled to the same, and, upon presentation to the city treasurer, they are paid; that from the time petitioner took said office down to and including September, 1912, he received such warrants for his salary each month, but that since September, 1912, no salary has been voted to him nor any warrant delivered to him for any instalment of his salary, but said council has constantly refused to vote said salary, and said mayor and clerk have constantly refused to execute and deliver warrants to him for his said salary, although repeatedly requested so to do; that said council have voted to the mayor and to the other commissioners their salaries regularly, ever since they were inducted into office. The petition further alleged that on March 3, 1913, he made demand in writing upon said council, during its regular session, to vote to petitioner said several monthly instalments of salary for the month of October, 1912, and for succeeding months to and including February, 1913, and said council by vote refused to pay any further salary to petitioner or any of said instalments of salary in arrears. The petition further alleged that the petitioner is now and has been continuously since May, 1911, the duly elected and qualified commissioner of said city and member of said council, and is entitled to said salary in monthly instalments of \$75, and that there was due him when the petition was filed said instalments for October,

November and December, 1912, and January and February, 1913, amounting to \$375, which said council refuses to allow to be paid. The petition prayed for a writ of mandamus directing the city council, at its next session, to vote the payment of said salary to the petitioner for said months, and to direct the mayor and city clerk to deliver warrants to petitioner therefor, and to vote and direct the issue of warrants for the monthly instalments of his salary in the future while he holds said office, and to direct the mayor and clerk to deliver to him warrants therefor while he occupies said office. A demurrer to the petition was overruled. The respondents thereupon filed an answer and a plea and an additional plea. We deem it unnecessary to set out separately the allegations of the answer and of the several pleas or the details thereof, which are very lengthy. They admitted petitioner's election, qualification and assumption of office, and also their own election, qualification and assumption of office. They alleged that petitioner had attended no meeting of the council since August 14, 1912, and that he had failed and wilfully refused to perform the duties of the office, and denied that he had been continuously a member of the council and that said instalments of salary are due him, but charged that he had abandoned his office, and that said council was without authority to vote him said salary. They stated the adoption of an ordinance, apportioning the executive and administrative powers and duties among the several departments, and set out in detail the duties pertaining to the department of streets and public improvements, and alleged that petitioner was designated commissioner of that department, and that he did not devote such time thereto as the duties thereof required and did not discharge the duties thereof and did not make the required reports pertaining to his department; that in April, 1912, the council made a new assignment of commissioners, whereby

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petitioner was assigned to the department of public property, and it set out in detail the duties of that department, as prescribed by ordinance, and alleged that he had not discharged any of the duties thereof, but wilfully neglected the same, and that by reason of this wilful neglect, he abandoned his office as commissioner and is not entitled to said salary. A demurrer to said answer and pleas was sustained. Defendants elected to abide by said answer and pleas and there was judgment for petitioner, awarding a writ of peremptory mandamus for said salary for the months above specified, and also for the months of March, April, May and June, 1913, said judgment being entered on July 25, 1913. This is an appeal by the defendants from that judgment.

In *Bullis v. City of Chicago*, 235 Ill. 472, it is held that: "The salary is incident to the title to the office and not to its occupation and exercise." If this were all that is there said, that case would be decisive of one of the main questions in this case; but it is there further said:

"If appellee was wrongfully prevented from performing the duties of his office, he may recover his salary for the time during which he was so prevented, where it has not been paid to any one performing the duties of the office. His earnings or opportunities to earn during that time were immaterial."

Where any one else has been paid for performing the duties of the office during the absence of the incumbent, it is the prevailing rule that the incumbent cannot recover such salary from the municipality. The prevailing doctrine, and the contrary doctrine, and the cases supporting each, are shown in *State v. Milne* [36 Neb. 301], 19 L. R. A. 689; *El Paso Co. Com'rs v. Rhode*, [41 Colo. 258], 16 L. R. A. (N. S.) 794; *Stearns v. Sims* [24 Okla. 623], 24 L. R. A. (N. S.) 475; and in the notes to said cases. This doctrine is recognized in *Kreitz v. Behrensmeyer*, 149 Ill. 496.

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It is not averred in the answer or pleas that the city has paid any one else for performing the duties of the office held by petitioner. But there is no claim that he was wrongfully prevented from performing those duties during the five months referred to in the petition. At first blush, it seems unjust that the city should be required to pay petitioner for services which he never rendered. The Supreme Court of Iowa, in *Bryan v. Cattell*, 15 Iowa 538, was confronted with a similar situation and experienced the same difficulty. It, however, there said:

“It must be remembered, however, that we are dealing with a practical and not an abstract question. And practically the difficulty in the view suggested is, that it would be impossible to tell where the true line should be drawn,—that is to say, how long an absence from official duties—how great delinquency—shall work a forfeiture of salary. In the absence of statute, shall it be one day, or one week, or one month, or one year? Where shall faithfulness end and delinquency begin? Add to these considerations the fact that it is frequently impossible to tell to what extent the services of officers were necessary, at the time covered by the supposed delinquency, and the propriety of the rule, which entitles the officer to his salary so long as he remains in office, becomes reasonably manifest. The better and safer rule doubtless is, that if he is in point of law actually in office, he has a legal right to the salary pertaining to it. His conduct may be such as to render him liable to removal, but when the statute makes no deduction for absence or neglect of duty, and the State takes no step as a consequence of such absence or delinquency, we suppose it is the legal right of the officer to demand the full salary allowed him by law.”

Speaking on this subject, Mechem on Public Officers, sec. 855, says:

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“The relation between an officer and the public is not the creature of contract, nor is the office itself a contract. * * * It exists, if it exists at all, as the creation of law, and, when it so exists, it belongs to him ‘not by force of any contract, but because the law attaches it to the office.’ The most that can be said is that there is a contract to pay him such compensation as may from time to time be by law attached to the office.”

To the same effect is Throop on Public Officers, sec. 500: “The right of an officer to his fees, emoluments or salary, is such only as is prescribed by statute; and, while he holds the office, such right is in no way impaired by his occasional or protracted absence from his post, or neglect of his duties. Such derelictions find their corrections in the power of removal, impeachment, and punishment provided by law. The compensations for official services are not fixed upon any mere principle of a *quantum meruit* but upon the judgment and consideration of the legislature as a just medium for the services which the officer may be called upon to perform. These may in some cases be extravagant for the specific services, while in others they may furnish a remuneration which is wholly inadequate. The time and occasion may, from change of circumstances, render the service onerous and oppressive, and the legislature may also increase the duties to any extent it chooses; yet nothing additional to the statutory reward can be claimed by the officer. He accepts the office ‘for better or worse’ and whether oppressed with constant and overburdening cares, or enabled, from absence of claims upon his services, to devote his time to his own pursuits, his fees, salary, or statutory compensation constitutes what he can claim therefor and is yet to be accorded although he performs no substantial service, or neglects his duties. * * * The fees or salary of office are ‘*quicquid honorarium*,’ and accrue from mere possession of the office.”

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In 28 Cyc. 451, note 70, cases are cited holding that no deductions may be made from a mayor's salary because of his personal private absences, and that the right of an officer to his salary is not impaired by protracted absence from his post or neglect of his duties. It no doubt is a fact that many times the holder of such an office performs little of the actual work, but that that is done by subordinates. The pleadings in the case do not show why petitioner failed to act during the five months in question. If he had been absent for that length of time on a protracted vacation, or in search of health, his right to the salary would be undoubted. So it would be, if he had been confined to his home by a serious illness which unfitted him for performing the duties of his office. The law affords a remedy against an officer who wilfully refuses to perform the duties of his office. Moreover, the act for the commission form of municipal government provides how the electors who are dissatisfied with a commissioner may recall him. We are of opinion that under the authorities above cited and under the case stated in the pleadings, this salary was attached to the office and did not depend upon the fidelity with which its duties were discharged. It is true that section 30 of the statute in question (J. & A. ¶ 1589) provides that where such a city has a population of over 20,000, the mayor and the commissioners shall devote at least six hours daily to the performance of their official duties, but we are of opinion not only that this does not apply to a city of under 20,000 population, but also that the council could not deduct anything from the salary of a commissioner if they were of opinion he had devoted a less time than that required to his official duties. It was held in *City of Earlville v. Radley*, 237 Ill. 242, that a city council has no power to fine an alderman for his neglect of official duty in failing to attend a council meeting. The same section 30 of the Act provides that the salary fixed by the

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council shall be the total and only compensation of the mayor and the commissioners for the performance of their respective duties, but this is only to prevent any effort to obtain extra allowances for the performance of unusual duties. The same section requires the mayor and commissioners to devote such time to the duties of their respective offices as a faithful discharge thereof may require, but that is only expressly stating what the law always implies as a requirement from every public officer. The law has not given the council the power to determine what is a faithful performance of his duties by any one of its members, nor make such deductions from his salary as in their judgment would remedy the evils of official nonaction.

It is, however, urged that the petitioner had abandoned his office, and reliance is had upon *People v. Hanifan*, 6 Ill. App. 158; *Harrison v. People*, 36 Ill. App. 319; and *People v. Spencer*, 101 Ill. App. 61.

These were not suits to collect salaries, but proceedings to determine which of two men claiming an office were entitled thereto; and the conduct there set out, under the circumstances of these particular cases, was held to have justified the proper body in filling the offices in which the original incumbents failed to act. The circumstances were held to show an intention by the original incumbents to abandon the office. Here, petitioner appeared and demanded his pay. He was originally installed in the office, he acted for much more than a year, and the only thing relied upon as an abandonment is that he has not performed the duties of his office after a certain date. Section 11 of the Act in question (J. & A. 1570) provides that if any vacancy occurs in the office of mayor or commissioner, the remaining members of the council shall, within thirty days after such vacancy occurs, appoint a person to fill such vacancy. It is not alleged in the answer or pleas that the council made any effort to appoint a person to the place held by petitioner, and it is to be

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assumed against the pleader that the council did not take any such step, and it is a fair presumption therefrom that it did not suppose that any vacancy existed or that the petitioner had abandoned his office.

The judgment awarded a mandamus, commanding the defendants to take the steps to pay petitioner not only for the five months stated in the petition, and which had expired before the petition was filed, but also for the following months of March, April, May and June, 1913. If issues of fact had been made and tried and evidence had been heard, showing that petitioner had not been paid for the months intervening between the commencement of the suit and the trial of the cause, a question might then have been presented whether the jury or the court could include in the verdict or finding and judgment pay for such intervening months. But this cause went to judgment upon a demurrer to answer and pleas, and the court could not from them judicially know that petitioner had any right to be paid or had not been paid for the months of March, April, May and June, 1913.

The judgment is therefore affirmed so far as relates to the months of October, November and December, 1912, and January and February, 1913, and is reversed as to the months of March, April, May and June, 1913, at the costs of the petitioner, appellee here, but without prejudice to the right of the petitioner to bring another suit for instalments accruing after February, 1913.

Affirmed in part and reversed in part.

The People of the State of Illinois for use of John McAndrews, Plaintiff in Error, v. John C. Bruner et al., Defendants in Error.

Gen. No. 5,912. (Not to be reported in full.)

Error to the Circuit Court of Iroquois county; the Hon. FRANK L. HOOPER, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 27, 1914.

Statement of the Case.

Action by the People of the State of Illinois for the use of John McAndrews against John C. Bruner, Fred Luhrsen, William Flanigan, Fred Weber and J. W. Conard in assumpsit. Service was had upon all of the defendants except J. W. Conard. An attorney entered the appearance of all the defendants. A declaration was filed in the name of John McAndrews, plaintiff, against the defendants. It contained two counts. The first count alleged that Bruner was the treasurer of Drainage District No. 4 in Iroquois county, and filed an instrument which was accepted by the drainage commissioners of said district, by which Bruner obligated himself to account for all moneys that came to his hands as such treasurer, and the other defendants obligated themselves for such moneys; that plaintiff contracted with the commissioners of said district to excavate certain ditches and the district agreed to pay him certain sums therefor on the monthly estimates of the engineer for the district, and that ten per cent. of the estimate for each month was to be withheld as security for the completion of the work and be paid to plaintiff when the work was completed and accepted; that plaintiff dug the ditches, received estimates and received ninety per cent. thereof from time to time and that Bruner as treasurer withheld ten per cent. of each of said estimates at the time; that the amount so withheld belonging to plaintiff amounted to

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\$1,158.25, and that plaintiff never received that sum from any one; that he completed his contract and the work was accepted by the district and the sum so withheld became immediately due and payable to plaintiff; that said sum came to the hands of Bruner as such treasurer and his duty required him to pay it to plaintiff when the work was completed and accepted, and that, though often requested, he had not paid it. The second count contained like allegations and set out said treasurer's bond in *haec verba*, showing it to be an instrument under seal and showing it not signed by defendant, Conard. This count also alleged an assessment made and collected to pay for said excavations, and that the money came to the hands of said treasurer and that plaintiff had a lien upon said funds in the possession of said treasurer to the amount of all estimates allowed in his favor; that the treasurer paid out of said funds divers amounts upon other claims and indebtednesses of the district and left no funds with which plaintiff could be paid. The defendants demurred specially and generally to said declaration and said demurrer was sustained and plaintiff elected to abide by the declaration, and defendants had a judgment in bar. To reverse the judgment, plaintiff appeals.

GOWER, COOPER, HOBBIÉ & PARISH, for plaintiff in error.

M. K. Smith, for defendants in error.

PER CURIAM.

Abstract of the Decision.

1. PARTIES, § 13*—*when declaration in suit for use irregular as to party plaintiff.* Where the People of the State of Illinois for the use of an individual is the plaintiff in the summons, it is irregular to file a declaration in the name of such individual alone as plaintiff.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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2. OFFICIAL BONDS, § 29*—*form of action in suit on bond under seal*. The proper form of action upon an official bond under seal is debt and not assumpsit.

3. OFFICIAL BONDS, § 32*—*sufficiency of declaration*. In an action on an official bond, a count in the declaration *held* defective as containing no allegations which would make one of the defendants liable on the instrument, which was not executed by him.

4. OFFICIAL BONDS, § 32*—*when declaration fatally defective*. In an action on an official bond of a treasurer of a drainage district for a balance claimed to be due to plaintiff for work and alleged to be wrongfully withheld by the treasurer, a declaration failing to allege whether the district was operating under the acts forbidding the treasurer of a district organized thereunder to pay out money except upon the written order of the majority of the commissioners, and failing to allege that plaintiff obtained any such order and presented the same to the treasurer for payment, *held* fatally defective, since the declaration must be construed most strongly against the pleader.

F. W. Matthiessen, Appellee, v. Conrad Ott et al. (Julia A. Clayton et al., Appellants.)

Gen. No. 5,947.

1. ROADS AND BRIDGES, § 64*—*essentials to jurisdiction of commissioners*. Upon the presentation of a petition for a private or public road, failure of the highway commissioners to fix a time and place for hearing and give notice thereof as required by statute (J. & A. ¶ 9660) leaves them without authority to make an order either granting or refusing the prayer of the petition.

2. ROADS AND BRIDGES, § 102*—*when certiorari to review proceedings of commissioners not barred by laches*. Mere lapse of time short of the period of limitation for a writ of error will not bar a writ of certiorari to review proceedings of highway commissioners, where nothing has been done by the public authorities, or with their permission, which will cause great public detriment or inconvenience in case the proceedings are quashed.

3. CERTIORARI, § 52*—*grounds for denying or quashing writ*. Where a party making application for a writ of certiorari is guilty of conduct in procuring error in the record which he seeks to review

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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he should be denied the writ, and it is the duty of the Court, if such conduct comes to his knowledge at any time before the writ is issued to deny the petition, or, if it comes to his knowledge after the writ is issued and the record made, to quash the writ instead of quashing the proceedings of the inferior tribunal.

4. CERTIORARI, § 32*—*parties*. Where the party whose land is taken for a road makes application for a certiorari to review the proceedings of the highway commissioners, the petitioners for the road are not entitled to be made parties, but they may appear before the court for the purpose of showing that the applicant was not entitled to the writ for the reason that he fraudulently procured the defective record which he seeks to review.

5. CERTIORARI, § 44*—*necessity of proof of grounds for refusing or recalling writ*. Mere allegations of fraud by the petitioner in procurement of a defective record, is not ground for refusing or recalling a writ of certiorari.

Appeal from the Circuit Court of La Salle county; the Hon. JOE A. DAVIS, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed December 3, 1914. *Certiorari* allowed by Supreme Court.

BUTTERS & CLARK, for appellants.

H. M. KELLY, for appellee.

MR. PRESIDING JUSTICE CARNES delivered the opinion of the court.

This was a petition for a common-law writ of certiorari filed by F. W. Matthiessen to review the action of the Highway Commissioners of Deer Park in La Salle county, in a proceeding to lay out a public and private road on the petition of Julia A. Clayton, Charles S. Clayton and Glennie Piercy, the appellants.

The petition for the road was presented to the highway commissioners June 7, 1909, under the Roads and Bridges Act then in force, and the section thereof entitled "Private Roads" (J. & A. ¶ 9681). The commissioners, without fixing a time and place for hearing and giving notice thereof, as required in that section of the statute by reference to the section providing for the laying out of public roads (J. & A. ¶ 9660),

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

denied the prayer of the petition. This omission of the highway commissioners left them without authority to make an order either granting or refusing the prayer of the petition, as held in many Illinois cases cited in the notes to the sections of the statutes above referred to. Appellants, however, took an appeal to three supervisors under the provisions of the act (J. & A. ¶ 9686), which resulted in an order by the three supervisors granting the prayer of the petition September 3, 1909, and further proceedings thereunder, including the assessing of damages to Matthiessen, whose land only was crossed by the road, at \$733. and the entry of a final order laying out the road November 12, 1910.

Matthiessen filed his petition for this writ of certiorari March 15, 1911, making defendants, only the highway commissioners and the town clerk, who is *ex officio* clerk of the board. The court, after notice to the defendants, ordered a writ issued returnable April 8, 1911, and afterwards on motion of petitioner extended the time for return to May 15, 1911. At the next term, on July 18, 1911, a return was filed, the record, among other things, showing the want of notice above mentioned.

Meantime on June 26, 1911, appellants appeared and obtained leave of court, "To file written motions, etc." Nothing further of importance seems to have happened for nearly two years, when on the sixth day of June, 1913, appellants filed a motion: "For leave to become parties defendant or to appear *amicus curiæ* * * * and for leave to enter their motion to quash the writ of certiorari awarded and issue in said cause," on the grounds: (1) That there are insufficient proper and necessary parties; (2) that said Matthiessen has been guilty of laches and acquiescence, and that he procured and has ratified said supposed irregularities and defects mentioned in said petition for certiorari, and by collusion with the commissioners of highways and

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other persons procured said supposed irregularities and defects to exist, and that the proceeding by a writ of certiorari is the result of fraud and collusion and should be quashed. Affidavits were filed in support of this motion.

The substance of the facts shown in appellants' petition and affidavits as summarized in their brief is: That there was great necessity for the road because appellants owned valuable land with no practicable way to reach it except across the land of Matthiessen, who denies them the privilege of crossing his land; that there had been two previous attempts, by way of petition to the highway commissioners, to compel the opening of a public and private road through his land, which had each failed, by the commissioners not taking necessary legal steps and being guilty of improper conduct induced by fraud and connivance of Matthiessen, who resorted to unfair means to bring error into the proceedings to defeat the road so that he might be able to acquire the ownership of the land; that in the present proceeding appellants employed competent attorneys to conduct the same, but they were unable to control the conduct of the commissioners, who followed the advice of the attorney of Matthiessen; that Matthiessen and his attorney appeared at every meeting of the commissioners and supervisors in the whole proceeding and knew of every step taken, and purposely contrived to bring about the supposed errors in the record of which he now complains; that he appeared and participated in the proceeding to condemn his land for right of way, and that the said \$733 damages allowed him to be paid by appellants was deposited for him with the justice of the peace, and appellants have paid a large amount of costs and attorney's fees; that Matthiessen appealed from said condemnation proceedings to the Circuit Court, and after dismissing his appeal sued out this writ of certiorari.

On June 27, 1913, appellants appeared by counsel and in the name of the highway commissioners moved

to quash the writ and dismiss the petition. Matthiessen objected on the ground that the commissioners of highways did not authorize the appearance or motion, and that they had made their return, which objection was sustained. Matthiessen then moved to strike the motion and petition of appellants to quash the writ from the files. The court without passing on that motion proceeded to hear evidence in support of the appellants' motion. Appellants offered in evidence only the files of the case, including their petition and affidavits, without any effort to prove any act or acts of Matthiessen that would support the general charges of fraud contained in their petition and affidavits.

The court entered an order denying Matthiessen's motion to strike appellants' motion from the files and denying appellants' motion to become parties to the proceeding and to quash the writ: Finding in the original proceeding that the highway commissioners, and supervisors on appeal, did not have jurisdiction to enter a legal or binding order, and ordering the proceedings quashed. It is recited in the court's order that appellants: "Pray an appeal from the judgment and order of this court denying the said Julia A. Clayton et al. the right to become parties to this proceeding and further denying and overruling the motion to quash the writ and dismiss the proceedings." Which appeal was allowed.

The record shows that the court having heard the testimony, "Overrules and denies the motion of Julia A. Clayton et al. (Appellants) to become parties to the proceeding *and to quash the writ.*" In the bill of exceptions it is recited: "Thereupon, the motion of the petitioner to strike the motion from the files, also the motion of Julia A. Clayton et al. to quash the writ in the above entitled cause, coming on for hearing, the said defendants, by their attorneys offered and introduced the following evidence." Then follows eighty pages of testimony offered by appellants, which con-

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sisted of files and documents as above stated, and is certified to be all the evidence offered in the case.

Appellants have followed the suggestion in *People v. Lower*, 254 Ill. 306, in bringing the matter of their motion to this court for review, by preserving their evidence and their exceptions to the action of the court in that regard by bill of exceptions. It is well settled that the common-law writ of certiorari is not a writ of right, and issues only upon application to the court and for special cause, and if it is issued improvidently, upon the facts being presented to the court the writ will be quashed. *Clark v. City of Chicago*, 233 Ill. 113, and authorities there cited. Mere lapse of time short of the period of limitation for a writ of error will not bar a writ of certiorari to review proceedings of highway commissioners, where nothing has been done by the public authorities, or with their permission, which will cause great public detriment or inconvenience in case the proceedings are quashed. *Schlosser v. Highway Com'rs Town of Warren*, 235 Ill. 214, explaining and distinguishing earlier cases that might be construed as announcing a different doctrine. We see nothing in this record to estop Matthiessen on the ground of laches from proceeding with his writ.

It is no doubt true that a party may be estopped by his own act from raising a jurisdictional question in a proceeding like this: (*People v. Crowley*, 250 Ill. 282, and authorities there cited and discussed); and we entertain no doubt that Matthiessen, if guilty of the conduct in general terms charged in appellants' petition and affidavits in procuring error in the record he seeks to review, could not be permitted a writ of certiorari to review that record, and that it was the duty of the Court, if such conduct came to his knowledge at any time before the writ was issued, to deny the petition, or, if it came to his knowledge after the writ was issued and the record made, to quash the writ

instead of quashing the proceedings of the inferior tribunal. Appellants were parties to the proceeding sought to be reviewed, and had a direct interest therein which would have permitted them or any of them to sue out a writ of certiorari. In *Sampson v. Highway Com'rs Chestnut Tp.*, 115 Ill. App. 443, this court held, in case of parties similarly situated, that the court had a right to permit them to intervene and show reason why the writ should not issue, but expressly said that it was not decided whether such parties had the right to appear and make such showing; that is, it was expressly decided that the court had a right to hear them on the question whether the writ should issue, and whether it would be error to refuse to hear them was not passed upon because it was not involved in that case. We are inclined to the opinion that under the circumstances of this case it would have been error for the court not to hear appellants in support of their allegations that the defects in the record sought to be reviewed were introduced into the record by the fraudulent acts of the petitioner. If Matthiessen induced the highway commissioners to pass on the petition for a road without fixing the time and place and giving the required notice, as is inferentially charged in the affidavits filed by the appellants, he could not be heard to question the record because of that defect, and we think it would have been error for the court to refuse any party to the record sought to be reviewed, who had a direct interest in the proceeding, the right to appear either before or after the writ was issued and show that such defect was brought about in that way. The Court should hear evidence, if offered, before ordering the writ, or afterwards, while he has the power to quash the writ, that would advise him whether the writ should issue or whether it had improvidently issued; but such evidence is directed only to the question of issuing the writ, or recalling it after it has been improvidently issued, and while parties in the position of appellants may be properly heard on

that question, and probably have the right to be heard thereon, they are not in any ordinary sense parties to the suit. After the question is settled whether the writ should issue, or whether it improvidently issued and should be recalled, the suit is tried on the record brought up, and appellants were not proper or necessary parties in that suit so tried.

Counsel insist with much vigor that the Court did not hear them on a motion to quash the writ, but refused to grant them leave to appear and make a motion to quash the writ; but the Court did hear evidence offered by them on a motion to quash the writ, if we are to believe the statements in the bill of exceptions prepared by them, and it appears he was giving them an opportunity to show that the writ should not have issued. Even if appellants understood the Court was hearing them on the question whether they should be permitted to file a motion to quash the writ, still when they were allowed to introduce evidence they should have shown or offered to show facts that would sustain their charges of fraud, for instance, the statement in appellants' petition that Matthiessen's attorney procured the commissioners to deny the petition without notice being given, and to do the things which were done by them and to commit the errors they committed, is well enough for a pleading, and on a question whether a writ should issue, or whether it should be recalled as improvidently issued, a court should investigate such an allegation; but when he permits the petitioner to introduce evidence in support of his charge and there is none introduced or offered as to any act done by Matthiessen or his attorney that would support such a charge, the Court might well disregard it. It can hardly be said that general allegations of fraud should suffice as grounds for refusing or recalling the writ.

Finding no error in the record, the judgment is affirmed.

Affirmed.

Charles E. Farrell, Administrator, Appellee, v. Reuben Bruce, Appellant.

Gen. No. 5,964.

1. SET-OFF AND RECOUPMENT, § 25*—*right of recoupment in action of trover by administrator.* In trover by an administrator to recover the value of certain certificates of deposit belonging to the deceased and wrongfully converted by defendant to his use, defendant is entitled to recoup for a portion of the money paid out by him for doctor's and undertaker's bills incurred in the last sickness of deceased and in his burial.

2. APPEAL AND ERROR, § 1698a*—*when error in instruction not waived.* Where an instruction given by plaintiff is erroneous for the reason it ignored defendant's right to recoupment, the defendant is not precluded from complaining of such instruction because he asked for no instruction covering that point.

3. PLEADING, § 303*—*when affidavit denying assignment of copy of instrument unnecessary.* Where a plaintiff in an action of tort unnecessarily files with his declaration a copy of an instrument, the assignment of which he seeks to impeach, he is not required to file with the copy an affidavit denying its assignment in order to offer proof in support of his action.

4. TROVER AND CONVERSION, § 19*—*when trover will not lie.* Where a decedent in his lifetime gave a person certain certificates of deposits for collection and the latter cashed the same and afterwards misapplied the proceeds, or refused to pay over the money so obtained, or the balance of it in his possession, to the administrator, *held* that the administrator could not recover the surplus in his hands in an action of trover.

5. WITNESSES, § 327*—*extent to which testimony in other proceedings may be inquired into.* Permitting a party to get before the jury the testimony of his witnesses in a proceeding in another court, on the theory that he was surprised and was endeavoring to refresh the memory and quicken the conscience of his witnesses, *held* improper as to extent to which the trial court allowed the inquiry to go.

6. APPEAL AND ERROR, § 472*—*when improper remarks of court not saved for review.* Objections to improper remarks of trial court are not preserved for review when no specific objection was made in the trial court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Farrell v. Bruce, 190 Ill. App. 309.

Appeal from the Circuit Court of Peoria county; the Hon. THEODORE N. GREEN, Judge, presiding. Heard in this court at the October term, 1914. Reversed and remanded. Opinion filed December 3, 1914.

SHEEN & GALBRAITH and GLEN CAMERON, for appellant.

QUINN, QUINN & McGRATH, for appellee.

MR. PRESIDING JUSTICE CARNES delivered the opinion of the court.

John Farrell died intestate September 27, 1912, seventy-nine years of age. About two weeks before his death, and in his last sickness, he delivered to Reuben Bruce, the appellant, twenty-five of his bank certificates of deposit which he indorsed on two different occasions, in part by writing his name and in part by his mark. Bruce procured the payment of these certificates in the lifetime of John Farrell and afterwards paid out of the money so obtained doctor's bills and undertaker's bills incurred in the last sickness and burial of deceased, and contracted for a monument to be placed on his burial lot. Charles E. Farrell, the appellee, was appointed and qualified as administrator of John Farrell's estate and brought this action of trover against appellant to recover the value of said certificates and obtained a verdict and judgment for \$2,370.13, the full amount of the certificates with interest, without any deduction for moneys that had been expended by appellant for the benefit of the estate. Appellant assigns error that he was not permitted to recoup moneys so paid by him. The instructions given at appellee's request ignore that right.

This error is well assigned. It is said in *Stow v. Yarwood*, 14 Ill. 424, on page 426, in illustration of the doctrine of recoupment: "If a stranger converts the goods of an intestate, and is sued in trover for the goods by the administrator, he may show in mitigation

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of damages, that he has applied the proceeds to the payment of the debts of the intestate." This case is cited in *Turner v. Retter*, 58 Ill. 264, and it is there held that the defendant may recoup damages under the plea of the general issue in action of trover. This is the settled law of this State; the authorities are collected and reviewed in *Sample v. Farson*, 174 Ill. App. 334. It is no answer to say that appellant asked no instruction covering that point. The instructions of appellee were erroneous in that respect, and the verdict and judgment were not supported by the evidence. Therefore, because of this error, the judgment must be reversed and the cause remanded for another trial.

The main contention on the trial was on the question whether John Farrell at the time of the delivery and indorsement of the certificates was mentally and physically able to understand the transaction and know what he was doing. If he was not, then the delivery and assignment was not his act and was of no force and effect. If he did understand what he was doing and was capable of transacting that business, then there is another question under the evidence as to the legal effect of what was said and done at the time, depending somewhat on a determination of fact as to what was said and done. Without expressing any opinion as to the weight of the evidence, we will notice other errors assigned so far as necessary to another trial of the case. The declaration was in the common form and the plea was the general issue. In the record filed here are copies of the twenty-five certificates in question following the copy of the declaration, but while copies of the indorsements thereon appear in that part of the record showing the certificates offered in evidence they do not appear at this place. It is assumed in argument that these copies of the certificates were filed with the declaration; therefore, it is argued that appellee cannot deny that the

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certificates were assigned to appellant, because he, the appellee, filed no affidavit denying the execution or assignment, and section 52 of our Practice Act (J. & A. ¶ 8589) is relied on in support of that contention. No authority is cited, and we know of none, that supports the position that a plaintiff in an action of tort, unnecessarily filing a copy of the instrument in question, the assignment of which he is attacking, must file with the copy an affidavit that it was not assigned, or be precluded from offering proof in support of his action. We do not regard this error well assigned.

Appellant contends that if it is found from the evidence that the certificates were given to him by the intestate to be collected, and he did rightfully cash them and afterwards misapplied the proceeds or refused to pay over the money so obtained by him or the balance of it in his possession to the administrator, that he is not liable in this action and relies on *Kerwin v. Balhatchett*, 147 Ill. App. 561, in support of that position. We think that case properly states the law so far as it may be applicable to questions arising under the facts here. The case of *Loomis v. Stave*, 72 Ill. 623, is in point. Trover does not lie to recover a surplus in the hands of a bailee as there stated, and if appellant was rightfully in possession of these certificates and rightfully collected the money due on them and there be moneys in his hands so obtained belonging to the estate, it cannot be recovered under the pleadings in this action.

Some of appellee's witnesses had before testified in the County Court on a trial involving the facts about which they were called to speak in this trial, and their testimony on this trial was not so favorable to appellee as he might well presume it would be. He was allowed, over appellant's objection, to get their testimony in the County Court quite fully before the jury, on the theory that he was surprised and was endeavoring to refresh the memory and quicken the con-

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science of his witnesses. This line of examination is permitted in certain instances with proper limitation, but we are of the opinion that the court erred in the extent to which he allowed the inquiry to go; but as there can be no claim of surprise as to the testimony of these witnesses on another trial, the question will probably not again arise.

Complaint is made of remarks of the court during the trial that are claimed to be prejudicial to appellant. There is no doubt danger that a court may inadvertently err in that manner, as was very aptly said by Judge Gary in *Kane v. Kinnare*, 69 Ill. App. 81; but to preserve that question for review, objection must be specifically made to the language employed by the Court. *Pegram v. Mutual Protective League*, 159 Ill. App. 214. An unguarded expression may often be relieved of harm if the Court's attention is at once called to it.

The judgment is reversed and the cause remanded.

Reversed and remanded.

**William Leisteko, Plaintiff in Error, v. Harry Smith
et al., Defendants in Error.**

Gen. No. 5,644. (Not to be reported in full.)

Error to the County of Court of Lake county; the Hon. PERRY L. PERSONS, Judge, presiding. Heard in this court at the October term, 1914. Affirmed. Opinion filed April 15, 1914. Reaffirmed on rehearing December 3, 1914.

Statement of the Case.

Proceeding by William Leisteko against Harry Smith and H. S. Roberts by distress warrant to recover three hundred dollars claimed to be due as rent for certain land described. The warrant was served

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by seizing certain chattels, and a summons was issued and served on each of the defendants who thereafter gave bond releasing the chattels from the levy. The defendants filed a plea of the general issue and a notice of certain set-offs. At the trial the court directed a verdict for the defendants, which was rendered. A motion for a new trial was denied and the defendants had judgment. To reverse the judgment, plaintiff prosecutes a writ of error.

A former judgment against the landlord was before the Appellate Court in *Leisteko v. Smith*, 160 Ill. App. 170.

ALFRED E. CASE and C. T. HEYDECKER, for plaintiff in error.

E. M. RUNYARD, for defendants in error.

MR. JUSTICE DIBELL delivered the opinion of the court.

Abstract of the Decision.

1. LANDLORD AND TENANT, § 375*—*nature of distress warrant.* A distress warrant is a suit at law for rent and, is governed by the common rules of pleading and by our Practice Act, except that the distress warrant stands as a declaration.

2. PLEADING, § 104*—*right to file inconsistent pleas.* Inconsistent pleas are permitted in this State, except that a plea in bar of the entire declaration cannot be filed with a plea of tender.

3. PLEADING, § 400*—*effect on issues when plea does not deny joint liability.* Notwithstanding joint liability has not been denied by plea, the evidence must show that each defendant is liable in order to entitle the plaintiff to a judgment against any one of them in an action *ex contractu*.

4. PLEADING, § 400*—*effect of plea of set-off on issue of joint liability.* In a suit at law against several defendants alleging a joint liability for a debt, the fact that the defendants filed a plea of set-off does not obviate the necessity of proving them all liable where they also pleaded the general issue.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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5. TRIAL, § 83*—*when request for leave to reopen case for further evidence properly refused.* Where in a suit against two defendants jointly for rent, the plaintiff, after having closed his case without proving the debt was still unpaid and without any evidence to prove that one of the defendants owed anything, asked leave to reopen his case for the purpose only of proving that the alleged sum was still unpaid, *held* that the court did not err in refusing leave.

6. JUDGMENT, § 192*—*right to judgment against joint defendant in actions ex contractu.* In a suit at law against several defendants alleging a joint liability for a debt, and all are served with process, the plaintiff in order to recover, must prove a case against all the defendants or else he must dismiss as to those whom he cannot prove liable and amend his declaration by striking out so much thereof as charges that the dismissed party was liable; otherwise, if he fails to prove a case against any one of the defendants, his suit fails.

Ferdinand Luthy et al., Appellees, v. Henry Ream et al., Appellants.

Gen. No. 5,972.

1. CORPORATIONS, § 173*—*validity of voting trust agreement.* A voting trust agreement entered into by a majority of the stockholders of a corporation whereby such stockholders assigned their stock to a trustee for a certain period of time, giving such trustee power to vote such stock as a unit as he may deem best, *held* valid and not against public policy, where the purpose of the agreement was for keeping a certain faction of the stockholders from securing control of the corporation, which the members of the trust agreement believed would be detrimental to the interest of all the shareholders.

2. CORPORATIONS, § 173*—*when voting trust not shown to be illegal.* The formation of a voting trust by a majority of the stockholders is not shown to be illegal for the reason that its purpose was to enable three of their number to obtain salaries as officers of the corporation, where there is no proof that it had any such purpose except such inference as may be drawn from the bare fact that such stockholders after becoming elected officers voted

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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themselves salaries, it also appearing that the amount of the salaries thus voted was reasonable.

3. CORPORATIONS, § 285*—*right officer to participate in voting his salary.* A salary voted to an officer of a corporation is illegal if the resolution fixing the compensation is carried by his vote.

4. CORPORATIONS, § 285*—*who may fix salary of officers.* Courts have no authority to fix the salary of an officer of a corporation, since such salaries must be fixed by the directors of the corporation, under the statute.

5. CORPORATIONS, § 284*—*right of officers to salary.* A person who serves as an officer of a corporation when no salary has been provided must render his services gratuitously; salaries cannot be fixed for the time that has passed.

6. CORPORATIONS, § 173*—*when shareholder not entitled to question legality of voting trust.* A voting trust agreement by a majority of the stockholders of a corporation cannot be attacked by the owner of a small minority of such shares on the ground that it is illegal because the trustee is left in sole control for a certain period of time, where a clause on the agreement contemplates that the trustee may die, resign or be removed for cause, and the vacancy so created filled and it is apparent from the agreement that only the holders of a majority of the shares in the voting trust could make objections to any act of the trustee.

Appeal from the Circuit Court of Peoria county; the Hon. JOHN M. NIEHAUS, Judge, presiding. Heard in this court at the October term, 1914. Affirmed in part and reversed in part. Opinion filed December 3, 1914.

JACK, IRWIN, JACK & MILES, for appellants.

THOMAS F. DOYLE, for Peru Plow & Wheel Co.

EVANS & EVANS and CHIPERFIELD & CHIPERFIELD, for appellees.

MR. JUSTICE DIBELL delivered the opinion of the court.

The Peru Plow & Wheel Company, an Illinois corporation, has been engaged in the manufacture of plows and other farming implements at Peru in La Salle county for many years and has been generally

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

successful in business. Its corporate stock has been increased at least twice, and in 1912 consisted of 4,000 shares of the par value of \$100 each. Under date of September 4, 1912, forty-one stockholders, owning in all 2,001 shares or a bare majority of the capital stock, entered into a trust agreement with Henry Ream, one of said stockholders. Said agreement recited that said stockholders deemed it to their interests that all of their stock should be voted as a unit upon all questions affecting the business and management of said company, and that Ream had consented to hold and vote such stock on behalf of the stockholders. It was therein agreed between said stockholders and said trustee for a valuable consideration, the receipt of which was acknowledged, and in consideration of the mutual covenants and agreements therein expressed, that said stockholders thereby assigned and transferred to said trustee the number of shares of stock of said company set opposite their respective names, to be held in trust by the said trustee for the respective stockholders by whom it was severally assigned, their personal representatives and assigns, upon the terms and conditions therein stated, some of which were as follows:

“1. The said Trustee shall hold, control and vote said stock as if he was the owner of all of said stock.

“2. Said Trustee shall determine how said stock shall be voted upon any question, at any time, and every meeting of the stockholders.

“3. All of said stock so held by the Trustee shall be voted as a unit.

“4. At all elections of directors of the Peru Plow & Wheel Company, said Trustee shall nominate three directors, to be voted for at such election, and said Trustee shall vote all said stock held by him as a unit for each and all of the directors so nominated by him.”

The fifth clause provided the manner of filling a vacancy which might be caused by the death, resigna-

tion or removal of the trustee, which was to be done by a majority in amount of the persons who then held the stock now owned by the parties to the agreement. The agreement proceeded:

“6. Said Trustee shall prepare and issue to the stockholders certificates showing the amount of stock held on behalf of each stockholder respectively, and the stock so held may be divided and transferred in like manner as if it had not been assigned, in trust, subject to the rights and powers of the Trustee under this assignment. But no such assignment, or transfer of stock, shall be effective for any purpose until surrender of the certificate issued by said Trustee, and the issue of a new certificate to the purchaser or assignee thereof.

“7. No fee shall be charged by such Trustee herein designated for any services performed in connection with the trust hereby created.

“8. Said Trustee shall collect and receive all dividends on the stock transferred to and held by him and shall immediately pay over the same to the holders of trust certificates representing such stock as their respective interests appear. The Trustee shall not demand or receive any compensation for receiving and paying over such dividends.

“9. The rights, duties and powers hereby conferred upon said Trustee shall expire and wholly cease on the first day of September, A. D. 1922, and the Trustee shall, at said time, assign and transfer to the persons who then hold Trustee's certificates, evidencing their ownership of shares of stock, the amount of stock to which each holder thereof is shown by his Trustee's certificate to be entitled.

“10. Said Trustee hereby accepts the trust hereby created by the above and foregoing instrument, and hereby undertakes to hold, own and vote said stock as therein provided, and to re-transfer the same on the first day of September, A. D. 1922, to the holders of

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Trustee's certificates, evidencing their right to receive the same.

"Said Trustee further undertakes at all times to vote the said stock by himself, or by proxy, and exercise his powers as Trustee in such manner as he shall deem to be for the best interests of the stockholders of the Peru Plow & Wheel Company. Said Trustee further undertakes to accept additional assignments of stock from any and all stockholders of the Peru Plow & Wheel Company, and to permit any stockholder thereof to become a subscriber to this agreement."

The contract contained some other provisions. It did not expressly provide that it could not be revoked before September 1, 1922, but that was the clear meaning of the language used. Each signer bound himself to all the others. Each agreement by one was a consideration for the signing by the others. The entire purpose intended to be accomplished would be likely to be defeated if a single signer, or his assignee of a trust certificate for two or more shares, could revoke the contract at will. The contract was signed by each of said forty-one stockholders, and by the trustee, and opposite each signature was set forth the number of shares owned by said stockholder. Each of said stockholders also assigned and delivered his certificate of stock to the trustee, and the trustee, pursuant to said agreement, issued to each stockholder a trust certificate, upon the following form:

"CERTIFICATE

of Trustee for Stockholders of the
PERU PLOW & WHEEL COMPANY

A corporation, under agreement of date September 4,
1912, with HENRY REAM, Trustee.

No. Shares

THIS IS TO CERTIFY that is the owner of shares of capital stock of the PERU PLOW & WHEEL COMPANY, held by the undersigned as Trustee, subject and pursuant to the

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terms, conditions and stipulations of a certain agreement between the undersigned as Trustee and certain stockholders of the said PERU PLOW & WHEEL COMPANY joining in said agreement of date September 4, 1912, (a copy of which said agreement is on file with the undersigned Trustee....reference being had thereto as to all the terms, conditions and requirements of said trust).

“This certificate is transferable only on the books of the Trustee by the holder thereof in person or by attorney upon the surrender of this certificate properly endorsed, when like new certificates will be issued to the proper owner thereof of record.

IN WITNESS WHEREOF I, HENRY REAM, Trustee aforesaid, pursuant to said Agreement of September 4, 1912, have hereunto set my hand and seal, this day of, A. D. 1912.

HENRY REAM, (Seal)
Trustee.”

On the back of each certificate was a form for an assignment of such certificate. Section 1 of article 6 of the by-laws of the corporation then in force made the president and the vice-president and the manager an executive committee, and gave such committee, subject to the board of directors, supervision of all the business and affairs of the company and of the policy to be pursued in carrying on its business, and made the vice-president chairman of the executive committee, and made any two members of said committee a quorum to do business at any meeting thereof, however called. Section 4 of article 6 of said by-laws provided that the salaries of the officers and of the manager of the company should be fixed by the board of directors. On September 10, 1912, the annual meeting of said corporation was held, and all but six shares were represented, either in person or by proxy. At that time the trust agreement had not been signed by all of those whose names were signed thereto when it was offered in evidence, but Ream held a proxy from all those who subsequently signed it. The board con-

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sisted of five members, and those who were then serving upon said board were all unanimously re-elected. They were Henry Ream, B. D. Brewster, William Holly, Ferdinand Luthy and D. W. Voorhees. The annual meeting of the directors was duly called and held on October 22, 1912. Ream was elected president, Brewster vice-president, Holly treasurer and Voorhees secretary, each unanimously. Voorhees was already the manager of the company at a salary of \$6,000 per year, under a previous contract hereinafter referred to. It was moved that the salary of the president, vice-president and treasurer be each fixed at \$2,400 per year, payable monthly, at the rate of \$200 per month, and commencing November 1, 1912. Brewster, Holly and Ream voted for said motion. Luthy and Voorhees voted against it, and it was declared carried. Among the stockholders who had entered into said trust agreement were Kate Cahill, John D. Cahill and Cornelius J. Cahill, each owning twenty-three and one-third shares. At some time between that and February 25, 1913, they assigned their seventy shares to Thomas Cahill. Before he paid for said stock he went to the office of Henry Ream, trustee, and Ream read to him said trust agreement, and he also read it himself. He asked for a certificate of shares of the corporation and this was refused to him, and he was given and accepted a trust certificate in the form above set out for seventy shares. On February 25, 1913, Luthy owned 1,092 shares of the capital stock of the Peru Plow & Wheel Company, Voorhees owned 765 shares, George T. Page owned 100 shares and Thomas Cahill owned said trust certificate for 70 shares.

On that day Luthy, Voorhees, Page and Thomas Cahill filed their bill in equity against said trustee and all the other holders of trust certificates and the Peru Plow & Wheel Company, in which they charged that said trust agreement was void for various reasons,

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stated in said bill, and that Thomas Cahill was entitled to have 70 shares of said capital stock issued to him by the officers of the company, and that the same had been refused to him; and the bill set up the election of said officers, and the fixing of said salaries by the affirmative vote of Ream, Brewster and Holly. The bill prayed that the trust agreement be cancelled; that the action of the directors in fixing said salaries be declared illegal; that Ream, Holly and Brewster be required to account to the company for the salaries received by each of them under said action and be required to pay the same to the company; that Ream, Brewster and Holly be declared to have forfeited their office as president, vice-president and treasurer, respectively, and be ousted therefrom; and that the president be directed to join with the secretary in issuing to Thomas Cahill a certificate for 70 shares of said capital stock. The corporation filed an answer and Henry Ream and all the other individual defendants also filed an answer. The cause was tried before the chancellor. A decree was entered, finding the facts concerning said trust agreement and said trust certificates and the transfer of the trust certificate to Thomas Cahill for 70 shares, and finding that said trust agreement was void as against public policy in that it placed the voting power and control of the corporation in said trustee, wholly separate from the ownership of said shares of stock, except the stock owned by Henry Ream, trustee; that the trustee had used such voting power to vest in himself and two other directors control of said corporation for the benefit of a part, only, of said stockholders, and that his conduct in that behalf was an abuse of the trust, and subjects said trust agreement to revocation and cancellation at the instance of Thomas Cahill, as the owner of 70 shares included in said trust agreement; that said trust agreement vests in Ream as trustee only the voting power as agent of the owners of stock

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who joined in said trust agreement, and that he holds only the proxy of said owners who joined him in said agreement and has only the power of voting without any interest whatever in the ownership of said stock, and that such agreement is subject to revocation at the instance of the owners of such stock who joined in such agreement; that Thomas Cahill had the right to revoke such power and had revoked it, and that the complainants were entitled to have Ream enjoined from further voting said 70 shares at any stockholders' meeting, and that Ream, as president, or his successor in office, should be required to join the secretary in issuing to Thomas Cahill a certificate of said corporation for said 70 shares of stock. The decree also found the action above stated in fixing said salaries for Ream, Brewster and Holly and that said officers had rendered only nominal services, and that their action in voting themselves said salary was unlawful and gave them no right thereto, and that each of them had drawn \$3,000 as such salaries and ought to restore the same to the company, with five per cent. interest, amounting to \$87.50 each. It was then decreed that a certificate for 70 shares of capital stock be issued to Thomas Cahill, and that Ream be enjoined from further voting said 70 shares at any stockholders' meeting; and that Ream, Brewster and Holly each pay to the corporation within ten days \$3,087.50, and that execution issue therefor; and they were enjoined from receiving any further sum as salary under said action of October 22, 1912, and it was ordered that Ream, Brewster and Holly pay the costs of suit. From that decree Ream, Brewster and Holly, and certain other of the signers of said trust agreement, prosecute this appeal.

There are numerous authorities which hold that the right to vote is an incident to the ownership of stock; that each stockholder owes his fellow-stockholders the duty to so use his right to vote upon his stock as to

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protect the general interests of the stockholders, sustain the general welfare of the corporation and conduct its business upon honest and prudent principles; that, though the stockholder may shirk this duty by absenting himself from meetings of the stockholders or by refusing to vote, yet the law will not allow him to strip himself of the power to perform his duty; that the right to vote upon the stock cannot be separated from its ownership; that it is unlawful and a violation of public policy to contract for a separation of this voting power from the ownership of the capital stock; that the owners of trust certificates in a voting trust are the equitable owners of the shares of stock which such certificates represent; that the incidental right to vote upon the stock necessarily attaches to said trust certificates, and that, where such owners elect to exercise that right to vote, the law will not permit the trustee to refuse it to them, even though the contract so provides; that where individual stockholders form a combination to control the majority of the stock and agree not to transfer their shares to the opposition or not to vote against the combination, such contracts are in restraint of trade and are against public policy and are void, and any stockholder may withdraw from such contract, though it is agreed that it shall be irrevocable; that such a voting trust agreement creates an inactive, as distinguished from an active, trust and is revocable at the will of the beneficial owners of the stock; that any agreement or device by which stockholders surrender their voting powers are invalid; that the power to vote can only be delegated by proxy with power of revocation, and this regardless of any pooling agreement. Among the cases supporting these positions are *Cone's Ex'rs v. Russell*, 48 N. J. Eq. 208; *White v. Thomas Inflatable Tire Co.*, 52 N. J. Eq. 178; *Bache v. Central Leather Co.*, 78 N. J. Eq. 484; *Bostwick v. Chapman*, 60 Conn. 553; *Commonwealth v. Roydhouse*, 233 Pa. St. 234; *Harvey v. Linville Improvement Co.*, 118 N. C. 693,

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32 L. R. A. 265; *Bridgers v. First Nat. Bank*, 152 N. C. 293; *Clarke v. Central Railroad & Banking Co.*, [50 Fed. 338], 15 L. R. A. 683. Other cases are cited in the foregoing authorities. Many of these opinions use very forcible language in announcing and sustaining the foregoing positions. The earlier editions of several of the text-books upon the subject are to the same effect.

In the main, these principles have not been adopted in Illinois. In *Faulds v. Yates*, 57 Ill. 416, speaking of an agreement similar in principle in many respects to the one here in question, the Court said:

“There was no fraud in the agreement, which has been so bitterly assailed in the argument. There was nothing unlawful in it. There was nothing which necessarily affected the rights and interests of the minority. Three persons, owning a majority of the stock, had the unquestioned right to combine, and thus secure the board of directors and the management of the property. Corporations are governed by the republican principle, that the whole are bound by the acts of the majority, when the acts conform to the law of their creation.”

The Court there further said:

“They knew they must make large expenditures of money. Incompetent and unfriendly directors and officers might involve them in much trouble, heavy expense and useless litigation. They had a double interest to protect, their interests as shareholders, and their interests as lessees. It is strange that a man can not, for honest purposes, unite with others in the protection and security of his property and rights without liability to the charge of fraud and iniquity. This agreement was made between persons who had invested a large amount of capital in an enterprise somewhat perilous. As shrewd, skilful and prudent men, they were desirous of increasing the investment, and making the stock more valuable. Their interests were identical with the interests of the minority shareholders. They could not destroy the property of the company, for the lands were of immense value if the

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mineral resources failed. If they increased the value of their own stock, they also increased the value of all other stock. If they destroyed the stock of others, they also, by the same act, destroyed their own. It is absurd to suppose that a sane man will ruin himself for the mere pleasure of ruining others."

The Court also said:

"The agreement in this case was not for the injury of the minority stockholders. It could not have been so intended, and we can not perceive that it could so operate. The selection of proper officers, the prudent management of the coal mines, the careful sale and purchase of stock, as provided for in the agreement, together with the expenditure of money in the improvement of the property, must have resulted in benefits to all the stockholders, and not alone to the parties to the particular agreement. A careful reading of the contract shows no hidden advantage intended, no fraud, no dishonesty."

This decision was approved in *Higgins v. Lansingh*, 154 Ill. 301, on page 357, and in *Kantzler v. Bensinger*, 214 Ill. 589. The same general question was before the court in *Venner v. Chicago City Ry. Co.*, 258 Ill. 523. Speaking of the voting trust agreement there under discussion, the Court said (p. 538) :

"The effect of the transfer was to place the legal title of the majority of the stock of the Chicago City Railway Company in the trustees, together with the voting power, which was thus separated from the beneficial ownership existing in the holders of the participation certificates, but was to be exercised in accordance with the latter's wishes, as expressed by a committee chosen by them for this purpose. Such a trust is not necessarily illegal. Ordinarily, men may make any disposition of their property they see fit, and they may therefore create a trust in their personal property for any purpose they deem best, so long as the purpose is not prohibited by statute or some rule of public policy. There is no statute of this State which prohibits a trust of the stock of a corporation for the purpose of controlling its management. There

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is no rule of public policy in this State which prohibits the combination of the owners of a majority of the stock of a corporation for the purpose of controlling the corporation. On the contrary, it has been expressly held that a contract by the owners of more than one-half of the shares of stock of a corporation to elect the directors of the corporation so as to secure the management of its property, to ballot among themselves for directors and officers if they could not agree, to cast their vote as a unit as the majority should decide so as to control the election, and not to buy or sell stock except for their joint benefit, is not dishonest, violative of the rights of others or in contravention of public policy."

The court there refers with approval to *Brightman v. Bates*, 175 Mass. 105, in which in an opinion by Holmes, C. J., now a member of the Supreme Court of the United States, the Court said (p. 110):

"It is suggested that this was an unlawful attempt by the contracting parties to deprive themselves in advance of their deliberative power and duty as stockholders, and to submit themselves to the dictation of five men who in the future might not be even members of the corporation. * * * There is no doubt that the subscribers might actually have done the things stipulated without giving any one a right to complain. That is to say, they might have held their stock and voted by previous understanding according to the advice of the committee, as long as they chose. The question is what they might contract to do; for this is supposed to be a case where a contract to do lawful acts is unlawful. * * * Supposing that the committee had been trustees, what would the syndicate agreement have amounted to then? Merely an agreement by each of the trustees to vote as they should jointly agree to vote, and an agreement by the subscribers not to demand back their shares for three years. The latter term certainly is not illegal, whether valid or not. A stockholder has a right to put his shares in trust, whatever his motive. If the trust is an active one he cannot terminate it at will,

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and the attempt to cut himself off by contract, instead of by the imposition of duties, from ending it, certainly is not enough to poison the covenant with the plaintiff. * * * It might be held that the duty of voting incident to the legal title made such a trust an active one in all cases. As to the arrangement for the trustees uniting to elect their candidates, the decisions of other States show that such arrangements have been upheld, and we do not think that it needs argument to prove that they are lawful. If stockholders want to make their power felt, they must unite. There is no reason why a majority should not agree to keep together."

In the *Venner* case, *supra*, the Court further used the following language (p. 540):

"The stockholders can control the affairs of a corporation only through the election of directors, and at every such election there is necessarily a combination of shares upon the persons elected. Such combination may be made at the time of the meeting, but there is no reason why stockholders may not agree beforehand to vote for certain persons as directors, and often they must do so in order to elect the persons desired. There is nothing in the law to prevent the owners of a majority of the stock from giving proxies to the same person. Unless restricted by its terms or by some statutory provision a proxy confers on the grantee a discretion, unlimited either in character or duration, until revoked. A majority of the stockholders may therefore, by uniting in the same proxy, confer upon an agent unlimited discretion to vote their stock, and there is no policy of the law to prevent their transferring the stock to a trustee with the like unrestricted power. It is the purpose for which the trust was created which must determine its legality. Besides those already cited, it has been decided in the following cases, among others, that the pooling of stock by the owners for the purpose of electing directors and officers and controlling the management and business of the corporation was not against public policy so long as no fraud was committed or wrong done to the other

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stockholders. (Citing cases). On the other hand, an agreement is invalid whose object is not the benefit of all the stockholders equally but is some unfair advantage to the parties to it, only, as where one of the parties is to have a certain office at a certain salary, or the parties to the agreement are to receive the profits to be made out of certain contracts to be entered into by the management under their direction, or the stock of the corporation is to be voted or its affairs managed by the determination of persons other than its stockholders or by a minority of its own stockholders."

It is held by the Supreme Court of Virginia in *Carnegie Trust Co. v. Security Life Ins. Co.* [111 Va. 1], 31 L. R. A. (N. S.) 1186, that the mutual promises of subscribers to a voting trust agreement to be bound by the terms thereof forms a sufficient consideration to uphold the agreement, and that such a trust is an active and not a passive trust, and that the placing of capital stock in possession of a trustee for twenty-five years to enable the trustees more effectively to manage the corporation is not against public policy and does not separate the ownership of the stock from the beneficial interest in such a manner as to render the transaction void. In that case the following is quoted from a leading writer on corporation law:

"A deposit of certificates of stock with trustees for a specified period of time, either with or without a transfer of the same to the trustees, is legal, and is not in violation of the usual statute against the alienation of personal property, and is not opposed to public policy as a restraint upon trade, and is not an implied fraud upon stockholders who were allowed to participate, and is not an illegal separation of the voting power from the ownership of the stock; provided always that no actual fraud is involved in the transaction. In other words, such a pooling of stock is not illegal in itself, but, like all contracts, may be illegal if actual fraud is involved."

In *Smith v. San Francisco & N. P. Ry. Co.*, 115 Cal. 584, 35 L. R. A. 309, the Supreme Court of California

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held, one judge dissenting, that the owners of the majority of the stock in a corporation may lawfully agree to be bound by the will of the majority of themselves in voting the stock; and that a stockholder entering into an agreement with others as a condition of their joining to purchase the majority of the stock of a corporation, that such stock shall be voted as a unit for five years as a majority of them shall determine, cannot be revoked by such stockholders; that an agreement to restrain the power of voting stock for five years so as to keep the control of the corporation from passing to other persons, made by a person who united in purchasing a block of stock, is not illegal as in restraint of trade; and that such a separation of the voting power of such stock from its ownership is not illegal or against public policy. These doctrines are supported by the later editions of the text writers. The case above stated from 115 Cal. is cited with approval by our Supreme Court in the *Venner* case, *supra*. We therefore conclude that in this State (unless it be as to one particular, hereinafter discussed) this voting trust agreement is not against public policy, but is valid on its face, and creates an active trust; that the mutual agreements to assign the stock to a trustee, who should act for the benefit of all, form an adequate consideration as between the stockholders who signed the same; that the subscribers and those who purchase these certificates from them are bound by the agreement and cannot revoke it before September 1, 1922; provided the object of the agreement, the purpose for which it was formed, was not illegal. The purpose which caused the formation of this trust agreement is therefore a material inquiry.

A careful reading of the evidence reveals the conditions which led to the creation of this voting trust. The company was organized many years ago. Its original incorporators and owners lived in Peru and

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vicinity. Several of the present defendants inherited their capital stock from their fathers. The work of manufacture has always been carried on at Peru. It has been a successful business. Its sales have averaged from \$300,000 to \$500,000 per year. Its profits have sometimes been as high as \$60,000 or \$100,000 per year, and have averaged \$40,000 for many years. It has paid large dividends. In recent years a very considerable part of the stock came to be owned by Peoria parties. It is evident that the ownership of the stock became divided between a Peoria faction and a Peru faction. These factions distrusted each other. Voorhees lived at Peoria. He became manager. The evidence is that though the Peoria party owned a minority of the stock, yet it largely succeeded in controlling the corporation. In February, 1912, the Peoria stockholders succeeded in inducing the company to enter into a written contract with Voorhees by which he should be general manager of the business affairs of the company for five years at a salary of \$6,000 per year and his traveling expenses, and he at the same time exacted and procured from Ream, who was then the president, a written promise to support Voorhees as general manager. The charter made the general office of the company at Peru. Voorhees opened an office of the company at Peoria. Luthy & Company were jobbers at Peoria of the same kind of implements manufactured by the Peru Plow & Wheel Company at Peru. Luthy had become the largest stockholder in the Peru Company. He was also a part owner of the business of Luthy & Company. Voorhees was also a part owner of that business, and was general manager of Luthy & Company. Voorhees therefore occupied two inconsistent positions. As general manager of the Peru Company, it was his duty to sell its product at the highest fair prices he could obtain. As general manager of Luthy & Company, it was his duty to procure merchandise from

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the Peru Company at as low prices as he could reasonably obtain. He established the office of the Peru Company at Peoria in the same building with Luthy & Company and employed a stenographer there. All this he did upon his own responsibility and without consulting the president or the executive committee of the Peru Company. Instead of spending his time at Peru he spent most of his time at Peoria, over sixty miles away. He visited the works at Peru one day each week, and sometimes two. He charged the company and caused it to pay him his traveling expenses between the two places. He made much use of the telegraph and telephone between Peoria and Peru and charged this to the company. He kept the books of the company at the office in Peoria. All this time he was also acting as general manager of Luthy & Company and conducting that business. In none of these things did he consult the president or the executive committee of the Peru Company. It is obvious that these things produced uneasiness in the stockholders who lived in Peru, including B. D. Brewster, who had removed to Peoria, but evidently continued his allegiance with the Peru faction. In June, 1912, the board of directors thought it necessary or advisable to adopt a resolution which, among other things, said that the company should not sell to Luthy & Company for a greater or less price than they sold to others. There was no danger under these circumstances that Voorhees would sell to Luthy & Company at a higher price than he sold to others, and the evident purpose of the resolution was to prevent his selling to Luthy & Company at a lower price than to others, and this indicates that distrust existed. In June, July and August, 1912, Luthy, who was the largest single stockholder of the Peru Company, made efforts to purchase a controlling interest in its stock. He first applied in person to some of the stockholders residing in Peru to sell to him, and, failing to buy any stock in

that way, he employed several persons who lived elsewhere to buy stock for him. The proof indicates that the stock was considered to be worth par. He authorized his agents to offer as high as three times the par value. In August, members of the Peru faction discovered that Luthy had purchased enough so that the Peoria faction lacked only forty-four shares of having a majority. Then began the organization by the stockholders of this voting trust in order that the Peru stockholders might retain control of the corporation and prevent that control being acquired by the faction at Peoria. We are satisfied from the evidence that this was the purpose which induced the formation of this agreement. Those who entered into it believed that there was danger that the profits of the factory at Peru would be absorbed by the jobbing house of Luthy & Company and they believed that it was being managed from Peoria much more expensively than it had been and could be managed at Peru. It is obvious that what they intended was for the benefit of all the stockholders alike and, if we are correct in this, then the purpose was legal and valid. We would not be understood to mean that no reason appears in the evidence why the Peoria party desired to get control of the corporation. It is evident that they regarded the methods of the Peru party as slow and behind the times, and considered that control by Voorhees was much more advantageous to the stockholders. While the Peru party was in power the officers established a branch house at Council Bluffs and that venture was unprofitable. The proofs tend to show that the company lost \$75,000 because of the opening of that branch house. Officers from the Peru party went to Council Bluffs and bought out a person having an interest in that business there, and paid him \$7,500 therefor, and it was the opinion of the Peoria party that that purchase could have been made for \$2,500. It is not doubted by the court but that each of these factions honestly believed that the welfare of the com-

pany and all its stockholders would be enhanced if that particular faction could have and maintain control over the business affairs of this company, and that each party was pursuing an honest and entirely lawful course in seeking to procure a majority of the shares of stock. It is immaterial to this inquiry whose judgment was the best. Whichever one was right, the purpose was lawful.

It is assumed in argument that at the time when the directors met in annual meeting in October, 1912, there was no by-law or resolution fixing any salary of president, vice-president or treasurer. The board was composed of five directors. The concurrence of three was necessary to fix a salary. Ream, Brewster and Holly were the only ones who voted for the salaries, and the vote of each of the three was necessary for the fixing of each salary. A salary voted to an officer of a corporation is illegal if the resolution fixing the compensation is carried by his vote. *McNulta v. Corn Belt Bank*, 164 Ill. 427; *Adams v. Burke*, 201 Ill. 395; *Voorhees v. Mason*, 245 Ill. 256. Therefore these salaries were illegally voted to and illegally received by these three officers, and so much of the decree as requires that they be refunded to the company was proper. Appellees contend that the purpose of forming this voting trust was to obtain these salaries, that is, to obtain a benefit special to three of the signers of this agreement. There is no proof that it had any such purpose, except such inference as may be drawn from the bare fact that more than a month after the agreement was signed by most of those who entered into it, these three men, after having been unanimously elected officers, voted to themselves these salaries. The proof is positive that in the making of this trust agreement there was no mention of any choice for directors or officers and nothing was said about any salary to be paid them, and we are satisfied that was not the purpose of the agreement. It was not un-

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natural that these officers should think that they should be paid salaries. Voorhees, the secretary and general manager, was receiving \$6,000 per year. A salary of \$2,400 per year for the president of a corporation doing so large a business as we have above stated would not be unreasonable, and a salary of that amount for a treasurer who would have the responsibility of handling from \$300,000 to \$500,000 per year would be very meager. The vice-president was by the by-laws chairman of the executive committee, and his duties and responsibilities would certainly justify a salary of that amount. Appellees introduced proof that these three officers in fact did very little, but this was because Voorhees took to himself practically all of the duties which would devolve on these three officers. He determined and performed all that should have been submitted to a president and to an executive committee. He hired a cashier, who handled substantially all of the moneys and thus absorbed the duties of the treasurer. If he had permitted these officers to perform the ordinary duties pertaining to their offices, the amount of the salaries voted them would not have been unreasonable. We approve the decree of the court below on that subject solely because the law did not permit them to vote salaries to themselves. Appellants contend that if we approve that portion of the decree, we should send the cause back to the Circuit Court with direction to hear proofs and ascertain and decree what would be a reasonable compensation to these officers for the services which they rendered. The courts have no such authority. Salaries must be fixed by the board of directors under the statute. He who serves as the officer of a corporation when no salary has been provided must render his official services gratuitously. Salaries cannot be fixed for the time that has passed. *Ellis v. Ward*, 137 Ill. 509, and authorities there cited; *Fritze v. Equitable Building & Loan Society*, 186 Ill. 183. It is contended

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that at least one of these officers, after he had received his salary, used some part of it to pay obligations which he assumed when he bought some of this capital stock in order to secure a majority to be signed to this agreement, and that the court may well suspect that they intended that result when this voting agreement was entered into. On a consideration of the slight evidence on this subject, we think this position unwarranted. After one of these officers had received his salary, he could make use of it as he saw fit and could apply it in payment of any debt he owed, and there is nothing in the evidence to suggest that payment for some of this capital stock was intended to be made out of salaries which they might thereafter vote themselves.

In the *Venner* case, *supra*, there was a committee of the stockholders who entered into the voting trust, which committee was to direct the policy of the trustee. Some suggestions are made in that case that through that committee the trustee was under the direction of the majority of those who entered into the voting trust. This agreement does not in terms authorize the majority of those who signed this trust agreement to control or direct the trust, and it is argued that the trustee is left in sole control for ten years, and that this renders the contract illegal. This perhaps presents the most serious question in the case. We have considered it in three lights. The fifth clause of the agreement contemplates that the trustee may die, may resign or may be removed for some cause, and provides how the vacancy so created shall be filled. Apparently no one could remove him, except those who held trust certificates for the majority of the shares in the voting trust, and this therefore seems to imply that under this agreement the members of the voting trust are to have control. Again, if, as in the *Venner* case, the members of the voting trust could lawfully appoint a committee of three to control the trust, why

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could they not select one stockholder instead of three, and permit him to control the situation for the ten years of the life of the agreement? If so, we see no reason why they could not confer that power on the same stockholder whom they selected as trustee; and the members of this voting trust unanimously conferred this power upon the same man whom they selected as trustee. But further, the members of this voting trust have not repudiated or objected to any act which this trustee has performed. Obviously, such objection to be effective must be by those holding a majority of the number of shares. Thomas Cahill, the owner of a certificate for only 70 shares, is in a small minority. All the others, by signing the answer in this case, approved the acts of the trustee. For aught that we can know, the trustee will always consult and conform to the wishes of the majority in this voting trust, and if he does so, this contract ought not to be set aside because it leaves a loophole by which perhaps he might act contrary to the wishes of the majority. When the majority complain that he has disregarded their instructions, or acted contrary to their wishes, it will be time enough to consider what result should follow therefrom.

So far as the decree holds the action of the board in fixing the salaries of said officers illegal and requires each officer to refund what he has so received, with interest, and enjoins further payment under the action of October 22, 1912, it is affirmed. In all other respects it is reversed.

Affirmed in part and reversed in part.

CASES
DETERMINED IN THE
THIRD DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS
DURING THE YEAR 1914.

**Joseph F. Davis, Defendant in Error, v. Midland
Casualty Company, Plaintiff in Error.**

1. INSURANCE, § 128*—*how policy will be construed.* Where the meaning of an accident insurance policy is ambiguous and uncertain, it must be construed liberally in favor of the insured and strictly against the insurer.

2. INSURANCE, § 432*—*what injury covered by accident policy.* Under an accident insurance policy providing, for certain payments for certain injuries, "while actually riding within a conveyance drawn by horse power * * * in consequence of a collision or other accident to the conveyance," it cannot be contended that the only injuries that can be recovered for are confined to injuries received in consequence of a collision or other accident to the conveyance, since the policy was issued to insure against injuries to the person of the insured while riding in a conveyance drawn by horse power.

3. INSURANCE, § 432*—*what is meant by term "total disability."* Under an accident insurance policy insuring against total disability, it is not necessary to constitute total disability that the insured be helpless, and the question of such disability is one of fact.

4. INSURANCE, § 432*—*when person insured is totally disabled.* Where an accident policy insured against total disability, and the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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insured was injured so that the use of one hand was prevented, and it appeared that he could do no work, though he was able to go around and give instructions to others, a verdict in favor of such insured was justified by the evidence.

Error to the Circuit Court of Vermillion county; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed July 2, 1914. Rehearing denied October 8, 1914.

HOLMES, MILEMORE & LEVIN, for plaintiff in error;
McKENZIE CLELAND, of counsel.

O. M. JONES and W. J. BOOKWALTER, for defendant in error.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

This is a suit begun before a justice of the peace upon an accident policy issued by the defendant. An appeal was taken from the judgment in the justice's court to the Circuit Court, where on a trial before a jury a verdict was returned in favor of the plaintiff for \$125, on which judgment was rendered, and the defendant has sued out a writ of error to review that judgment.

Part 2 of the policy sued on provides for "Twenty-five dollars per week indemnity for accidents as specified should the Insured sustain injuries from causes or under conditions such as specified in clauses 1, 2, 3, 4, 5, 6, 7 and 8 in part One (1), which shall not prove fatal or cause other loss as aforesaid, but shall immediately, continuously and wholly disable and prevent the Insured from performing each and every duty pertaining to any and every kind of business, labor or occupation, during the time of such disablement, but not exceeding five (5) consecutive weeks." Clause 5 of part 1, provides for certain payments for certain injuries: "(5) While actually riding within a con-

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veyance drawn by horse power, provided that the Insured shall not then be a hired driver thereof, or be riding or driving in or upon any conveyance used for any business purpose or any work whatsoever at the time of the accident, in consequence of a collision or other accident to the conveyance in which the insured is so riding."

The defendant in error is a farmer, who was injured while driving a young horse hitched to a buggy in which he was riding from his home to the village of Oakwood. The horse being unruly, defendant in error struck it with a whip, when it kicked up over the dashboard striking the defendant in error's hand, breaking several bones and lacerating it so that he was unable to do any farm labor for several weeks.

The plaintiff in error insists that the only injuries that can be recovered for are confined to injuries received in consequence of a collision or other accident to the conveyance in which the insured was riding. This is too narrow a construction. The policy was issued to insure the plaintiff in error against injuries to his person while riding in a conveyance drawn by horse power. There is nothing in the policy insuring against damage by the vehicle. The policy was prepared by plaintiff in error, and the meaning being ambiguous and uncertain, because of its phraseology, it must be construed liberally in favor of the insured and strictly against the Company. *Travelers' Ins. Co. v. Ayers*, 119 Ill. App. 402. The only reasonable construction to be given to clause 5 of part 1 and part 2 is that defendant in error was insured, while riding in a horse-drawn vehicle, against bodily injuries arising from a "collision or other accident," which prevented him from performing his duties, business or labor.

It is also argued that the only accidents insured against are "accidents causing total disability; there is no indemnity whatever for partial disability.

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* * * The accident prevented only the use of one hand." The proof is that the plaintiff in error could not do any work although he was able to go around and give instructions to others. It is not necessary to constitute total disability that the insured be helpless. *Grand Lodge, Brotherhood of Locomotive Firemen v. Orrell*, 206 Ill. 208, 109 Ill. App. 422; Cooley's Brief on Ins. 3291. The question of total disability was a question of fact, and the evidence justified the verdict of the jury and the judgment thereon. The judgment is affirmed.

Affirmed.

**Charles M. Peirce, Appellant, v. Levi W. Sholtey and
D. A. Taylor, Appellees.**

1. PLEADING, § 104*—*how many pleas party may file.* A party may file as many pleas as he may deem necessary for his defense, and each plea stands by itself and forms a distinct issue.

2. PLEADING, § 104*—*when pleas not inconsistent.* Pleas of general issue and denying joint liability are not inconsistent.

3. SET-OFF AND RECOUPMENT, § 28*—*when party may recoup damages under general issue.* A party may recoup damages under the general issue where the damages arise out of the transaction which is the subject of the plaintiff's action.

4. ATTORNEY AND CLIENT, § 137*—*when instruction as to fees not misleading.* In an action for attorney's fees, an instruction that the burden of proof is on the plaintiff to prove his case by a preponderance of evidence, and if he has failed to make such proof the jury should find the issue for the "defendant," is not misleading though there were two defendants, and such instruction is not erroneous as placing the burden of proving every issue by a preponderance of the evidence.

5. ATTORNEY AND CLIENT, § 137*—*when instructions as to liability, for fees inaccurate.* In an action against two defendants to recover attorney's fees, instructions requiring the plaintiff to prove that he was employed by both defendants were inaccurate, where one defendant admitted joint liability by his default but his admission was not binding on the other defendant.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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6. ATTORNEY AND CLIENT, § 137*—*when party entitled to instructions.* In an action for attorney's fees, where a plea of the Five-Year-Statute of Limitations was on file, the plaintiff was entitled to have the jury instructed on the legal question raised by the plea; and the error in refusing instructions was not remedied by the withdrawal of the plea after the verdict and filing of a motion for new trial, or by the fact that the defendant asked no instructions as to the plea.

7. ATTORNEY AND CLIENT, § 137*—*when instruction properly refused.* In an action for attorney's fees, a requested instruction as to the question of recoupment was properly refused where it limited the right to recoup to the loss of a valid claim, and made no reference to money paid out by reason of any negligence of the plaintiff, if any was so paid, and where a proper instruction on the subject was given.

8. ATTORNEY AND CLIENT, § 137*—*what instructions erroneous.* In an action for attorney's fees, instructions that a claim of recoupment was an admission by the defendant that the amount claimed in the declaration was due, and that the filing of the general issue waived a plea denying joint liability, were properly refused since they did not state a correct proposition of law.

Appeal from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the April term, 1914. Reversed and remanded. Opinion filed July 2, 1914. Rehearing denied October 7, 1914.

CHARLES M. PEIRCE and D. D. DONAHUE, for appellant.

WELTY, STERLING & WHITMORE, for appellee Levi W. Sholtey.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

This suit was brought by Charles M. Peirce in March, 1913, to recover attorney's fees from Levi W. Sholtey and D. A. Taylor for services averred to have been rendered for defendants by plaintiff. The declaration consists of one count in assumpsit in which the *ad damnum* is laid at \$2,500, to which is attached a bill of particulars containing items of charges ex-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

tending from January, 1905, to October, 1909, amounting to \$6,192.05, and items of credit amounting to \$1,258.90. This bill of particulars was afterwards amended by adding items amounting to \$750, for services from January, 1903, to December, 1904. The defendant Taylor was defaulted. The defendant Sholtey filed three pleas: (1) A plea of the general issue; (2) a verified plea denying joint liability; and (3) a plea of the Five-Year-Statute of Limitations.

The case was tried by a jury and a verdict returned in favor of defendants, on which judgment was rendered. The plaintiff prosecutes this appeal.

Appellant claims to have earned the attorney's fees for which he sues in litigation arising out of the making of a judgment note for \$1,200, by Otto Taylor and Mary E. Taylor. Mary E. Taylor is a daughter of Levi W. Sholtey and the wife of Otto Taylor. Judgment in favor of George Johnson was entered on the said note, and an execution was issued on that judgment and levied by the sheriff of Ford county on some farm stock and machinery of the value of about \$1,600 that was claimed to be the property of Levi W. Sholtey, Otto Taylor, D. A. Taylor and other persons. The part of this property that was claimed to be owned by Sholtey was of the value of about \$1,250, and D. A. Taylor owned most of the remainder of the property. The litigation began in 1903 and continued to 1910.

After the sheriff had levied on the property, Sholtey and D. A. Taylor, who are farmers in Ford county, went to Paxton, where Sholtey employed Peirce to recover the property claimed by him. Taylor was with Peirce at the time Peirce was employed, and Peirce claims he was employed by Sholtey and Taylor jointly. Sholtey and Taylor also went to the office of Schneider & Schneider, attorneys at Paxton, and they were retained, Sholtey claims by Taylor, but Schneider & Schneider claim they were retained by both Sholtey and Taylor. However, after the retainer of counsel,

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notice of trial of the right of property in the County Court was given, and a trial resulted in a judgment in favor of the claimants, from which no appeal was taken.

Before the trial of the right of property and the various suits for which appellant claims fees, Otto Taylor and Mary E. Taylor were adjudged bankrupts. After the trial of the right of property, in which it was adjudged that Sholtey was entitled to the possession of the property claimed by him, the sheriff, instead of returning the property to Sholtey, turned it over to H. Clay Wilson, trustee in bankruptcy of the estate of Otto Taylor, on an *ex parte* order of the United States District Court.

Appellant entered a limited appearance for Sholtey in the Taylor bankruptcy matter in the Federal District Court, made a motion to set aside the order on the sheriff to turn the property over to the trustee and filed a plea to the jurisdiction of that court, but filed no plea of prior adjudication. That court simply passed on the question of jurisdiction and did not pass on the motion to vacate the order to turn the property over to the sheriff. This suit was appealed by Sholtey, on the advice of appellant, to the United States Circuit Court, where the appeal was dismissed, and the court suggested that a petition be filed in the District Court to review the *ex parte* order to turn the property over to the sheriff. That was done and that order was vacated.

In the meanwhile Wilson, the trustee, had advertised the property and sold it as the property of Otto Taylor, bidding it in himself at \$975. Sholtey was advised by appellant not to buy the property at the sale, but an agreement was made between Sholtey and the trustee, under which Sholtey accepted the property from the trustee at \$975, and the trustee was to hold the money until the District Court decided who was entitled to it. When the *ex parte* order had been

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vacated, the court directed the trustee to turn the \$975 over to Sholtey.

Peirce brought suit against the sheriff and his bondsmen to recover the value of the property which the sheriff had turned over to the trustee. A verdict was obtained for \$1,250, which was set aside. A second trial resulted in a judgment for defendants, which was reversed by the Appellate Court, that court in its opinion informing counsel for Sholtey what the remedy and the measure of his damages were. (*People for use of Sholtey v. Crowe*, 130 Ill. App. 349). On a retrial in the Circuit Court a judgment in favor of Sholtey for one cent was rendered, the trial court holding that under the declaration only nominal damages could be recovered. On the trial of that case in the Circuit Court, the trial court pointed out to appellant why only nominal damages could be recovered, and suggested that the declaration be amended that actual damages might be recovered, but appellant, as attorney for Sholtey, declined to accept the suggestion of the court. That case on appeal by Sholtey was affirmed by the Appellate Court. (*People for use of Sholtey v. Crowe*, 145 Ill. App. 450).

After the Federal Court had directed the trustee to turn the \$975 over to Sholtey, appellant advised him not to accept it and that he was entitled to all his costs and expenses in getting the *ex parte* order vacated. After the suit against the sheriff and his bondsmen had been disposed of, Sholtey employed other counsel who advised him to accept the \$975 and interest, which was then paid to Sholtey by the trustee, who had been willing and anxious to pay it to him ever since the Federal Court had revoked the *ex parte* order. There was also a replevin suit for a horse and buggy worth \$150, resulting in a judgment for Sholtey, from which no appeal was taken.

The foregoing appears to be a summary of the litigation in which Sholtey was interested.

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There was other litigation to which Sholtey was not a party arising out of these matters in which appellant, as counsel, took part, but Sholtey insists without his direction. Among these proceedings was an indictment against certain parties for conspiracy in obtaining the judgment note; the presentation of the claim of Johnson against the bankrupt estate; a suit for damages against Johnson and his attorneys and the trustee in bankruptcy; a suit of Taylor against the sheriff for levying on exempt property; an appeal of that case to the Appellate Court (*Taylor v. Crowe*, 122 Ill. App. 518) and the taxation of costs in several of the cases.

From the evidence it is clear that all the property that appellee had involved in this litigation was about \$1,250, and that the trial of the right of property settled this right to the recovery of what he claimed. While the sheriff turned that property over to the trustee in bankruptcy on an order wrongfully obtained from the Federal Court, that court ordered it transferred back to appellee when a motion was made asking that it be done and a ruling made thereon. There was a large amount of useless, protracted and needless litigation that occupied the time of counsel and the courts for several years. The appellee has paid to appellant \$2,096, of which appellant has expended for costs and expenses about \$855, leaving \$1,241 as fees received by appellant, in addition to which Sholtey has paid to Schneider & Schneider \$1,375, and to other counsel \$200, as attorneys' fees in this litigation.

The appellee, Sholtey, first filed a plea, properly verified, denying joint liability. Afterwards a plea of the general issue was filed. The appellant contends that by filing the plea of the general issue appellee waived all right to insist on appellant proving the joint liability of appellees. In this State it is uniformly held that a party may file "as many pleas as he may deem necessary for his defense, each plea stands by itself and forms a distinct issue, and it is not an objection

that some are inconsistent with each other; for example, where the general issue is pleaded, and with it a plea in bar, or tender, or the statute of limitations.” *Farnan v. Childs*, 66 Ill. 544. The pleas of general issue and denying joint liability are not inconsistent. That contention of appellant is not well founded.

It is also contended that the appellee Sholtey could not recoup damages occasioned by any carelessness of appellant. The appellee contends that his matters were not properly attended to, and that appellant gave him very negligent professional advice in his legal matters and that the services were not only worthless to appellant but detrimental. The damages, if any sustained by appellee, from the action of appellant in appellee’s legal matters out of the conduct of the suits for which appellant seeks to recover fees, relate to and are a part of those transactions. A party may recoup damages under the general issue, where the damages arise out of the transaction which is the subject of plaintiff’s action. *Waterman v. Clark*, 76 Ill. 428.

Complaint is made concerning certain instructions given at the request of Sholtey. The first instruction tells the jury that the burden of proof is on the plaintiff to prove his case by a preponderance of the evidence, and if he has failed to make such proof they should find the issues for the defendant. It is contended that this instruction is misleading because there were two defendants. The jury could not be misled by the use of the word “defendant” for “defendants.” It is also said, it placed the burden of proving every issue by a preponderance of the evidence; it only placed the burden of proving his case on the plaintiff. There was no reversible error in this instruction.

The second, third, fourth, fifth and sixth instructions given for Sholtey each relate to different suits in which Sholtey was not a party. They tell the jury that before the appellant can recover for fees in such matters he must prove by a preponderance of the evidence

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that he was employed by both the defendants. The defendant Taylor admitted by his default that he was jointly liable for such matters with Sholtey, but the admission of Taylor was not evidence against Sholtey that appellee Sholtey and he jointly employed appellant. Appellant might have been employed by both Taylor and Sholtey separately. The plea required that appellant prove by a preponderance of the evidence that Sholtey and Taylor jointly employed appellant in the several matters for which appellant was seeking to recover. These instructions are inaccurate. They technically state a proposition of law more in favor of appellant than he was entitled to.

It is also contended that the court erred in refusing certain instructions requested by appellant. Five instructions refused pertain to the Five-Year-Statute of Limitations. This is not a case where the defendant had to introduce proof to sustain the statute of limitations. The proof offered by plaintiff showed that the contract, for whatever he was retained to attend to, was oral and that the services began eleven years before the suit was brought. A plea of the Five-Year-Statute of Limitations was on file. The statement of the account as amended, and concerning which there is some proof, extended over the entire time of the litigation. With the plea on file appellant was entitled to have the jury instructed on the legal question raised by the plea. After the verdict and the filing of a motion for a new trial, counsel for Sholtey obtained leave to withdraw the plea. That could not remedy an error in refusing instructions on the question raised by the plea, neither would the fact that appellee asked no instructions concerning the statute deprive appellant of his right to have proper instructions given on the questions raised by the plea while it remained an issue in the case before the jury.

The third refused instruction of appellant is concerning the question of recoupment. It was properly

refused because it limited the right to recoup to the loss of a valid claim, and made no reference to money paid out by reason of any negligence of appellant, if any was so paid, and all that was proper in this instruction was given in appellant's third given instruction. The fourth refused was fully given in appellant's second and fourth instructions.

The sixth, refused, told the jury that a claim of recoupment was an admission by the defendant that the amount claimed in the declaration was due. The seventh, refused, told the jury that the filing of the general issue waived the plea denying joint liability. Neither of these last mentioned instructions state a correct proposition of law. Some other matters are presented by the voluminous argument and brief of appellant which we do not deem it necessary to review, as we find no merit in them.

For the error in refusing to give any instruction requested by appellant on the questions raised by the plea of the statute of limitations and the giving of instructions which required plaintiff to prove that he was employed by both defendants, when technically the requirement should have been that he was employed by the defendants jointly, the judgment is reversed and the cause remanded.

Reversed and remanded.

E. S. Combs, Appellee, v. James Pulliam, Appellant.
(Not to be reported in full.)

Appeal from the Circuit Court of Shelby county; the Hon. ALBERT M. ROSE, Judge, presiding. Heard in this court at the April term, 1914. Reversed. Opinion filed July 2, 1914. Rehearing denied October 7, 1914.

Statement of the Case.

Action of assumpsit by E. S. Combs against James Pulliam to recover the value of certain farm machinery sold and delivered by plaintiff to Harry Paradee. The declaration contained only the common counts. The evidence showed that Paradee was the son-in-law of defendant; that defendant orally guaranteed payment of goods furnished to Paradee; that such goods were sold and charged to Paradee and a note taken in payment of the account and transferred to a bank of which plaintiff was president; that defendant indorsed such note, but after maturity the bank took another note of Paradee without indorsement and surrendered the original note, and that the bank had judgment against Paradee on the last note. A jury returned a verdict in favor of plaintiff for \$38.35, on which judgment was rendered, and the defendant appealed.

CHAFEE & CHEW, for appellant.

E. A. RICHARDSON and WHITAKER, WARD & PUGH, for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

Abstract of the Decision.

1. FRAUDS, STATUTE OF, § 2*—*when promise to answer for debt of another must be written.* Under the statute of frauds no action

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The Starr Piano Co. v. Lawrence, 190 Ill. App. 351.

shall be brought to charge a defendant on any special promise to answer for the debt of another unless the promise, or some memorandum thereof, is in writing signed by the party to be charged.

2. FRAUDS, STATUTE OF, § 119*—*when statute need not be pleaded to be available as defense.* Where the declaration in an action of assumpsit consists of the common counts only, it is not necessary to plead the statute of frauds in order to have the benefit of such statute.

3. FRAUDS, STATUTE OF, § 16*—*what constitutes promise to answer for debt of another.* Where goods were sold to a person, the promise of a third person, that he "would see that they were paid for, guarantee the payment," was simply a promise to answer for the debt of another, and was not an original promise.

4. BILLS AND NOTES, § 215*—*when indorser discharged.* Where a buyer of goods gave a note therefor, indorsed by another, but such note was surrendered after maturity, and an unindorsed note of the buyer accepted, the indorser of the original note was not liable.

The Starr Piano Company, Appellant, v. G. W. Lawrence, Appellee.

(Not to be reported in full.)

Appeal from the County Court of Piatt county; the Hon. LAWRENCE T. ALLEN, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed July 2, 1914. Rehearing denied October 7, 1914.

Statement of the Case.

By virtue of certain executions issued out of the Circuit Court of Piatt county, the coroner levied on seven pianos in the possession of the firm of Combes & Frisinger. Such executions were issued on three judgments rendered in favor of G. W. Lawrence, the first being against Combes, the second against Frisinger and Agnes Frisinger and the third against Frisinger. Afterwards there was a trial of right of property, in which The Starr Piano Company was

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The Starr Piano Co. v. Lawrence, 190 Ill. App. 351.

claimant and Lawrence defendant, before the court without a jury, and judgment being entered finding the right of property in the defendant, the claimant appealed.

HUGH CREA, HUGH W. HOUSUM and HICKS & DOSS,
for appellant.

HERRICK & HERRICK, for appellee.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

1. TRIAL, § 295*—*when propositions of law and fact may be submitted in trial by court.* Where a court had made its findings, entered judgment thereon, and an appeal has been prayed and allowed, a motion to set aside the judgment and for leave to submit certain propositions of law and fact, and requesting the court to rule on such propositions and mark the same either held or refused, and a motion to set aside the judgment and for a new trial, are properly overruled, since the time to present propositions of law and fact on a hearing without a jury is after the evidence and arguments are concluded and before the court has made its decision, and the court had no jurisdiction to entertain either motion until the order for appeal had been vacated.

2. APPEAL AND ERROR, § 645*—*when order allowing appeal may be vacated.* Where a court in a trial without a jury had made its findings, entered judgment thereon and allowed an appeal, a motion to set aside the order for appeal and judgment and for a new trial was properly overruled, since while the setting aside of the order of appeal might have been allowed, the allowance of such motion would not necessarily vacate the judgment, and the vacation of the judgment would not necessarily set aside the findings of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Leaverton v. Myers, 190 Ill. App. 353.

**Grace H. Leaverton, Appellant, v. John A. Myers,
Appellee.**

(Not to be reported in full.)

Appeal from the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed July 2, 1914. Rehearing denied October 7, 1914.

Statement of the Case.

Action in assumpsit by Grace H. Leaverton against John A. Myers to recover for four months' rent under a lease. It appeared that the defendant was occupying a flat under a renewal of a lease, that he vacated the premises, and that the suit was for two hundred dollars for the rent for the four months after such vacation. There was also evidence that the plaintiff failed to make certain repairs and repudiated an agreement to make such repairs, and that the plaintiff failed to have noise caused by tenants in an upper flat discontinued, causing discomfort to the defendant's wife, who was ill. The defendant's plea alleged the surrender of the premises and the plaintiff's acceptance of the same. The jury found the issues for the defendant and judgment was rendered in his favor, whereupon the plaintiff appealed.

SMITH & FRIEDMEYER, for appellant.

GILLESPIE & FITZGERALD, for appellee.

MR. JUSTICE ELDBEDGE delivered the opinion of the court.

Abstract of the Decision.

LANDLORD AND TENANT, § 449*—*when evidence sufficient to show surrender of premises.* In an action for rent, where the evidence

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.
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was conflicting as to what was said and done between the lessor and lessee and their agents as to the surrender of the premises and the making of a new lease for another flat, the questions were for the jury, and the verdict would be sustained when not manifestly against the weight of the evidence.

John Y. Chisholm, Trustee, Appellee, v. First National Bank of Leroy, Appellant.

1. **BANKRUPTCY, § 23***—*when evidence sufficient to show preference.* In an action to recover the amount of an alleged unlawful preference under the provisions of the Bankruptcy Act, where the evidence did not show clearly whether the bankrupt was insolvent at the time of the preference, the question whether the defendant knew or had reasonable cause to believe that such bankrupt was insolvent and that it would receive a preference from the proceeds of the sale of an elevator and crib of corn and certain drafts was for the jury, its finding in the affirmative being supported by the evidence.

2. **BANKRUPTCY, § 21***—*what constitutes preference.* Where the sale of a bankrupt's property was made to satisfy a debt of a defendant and not voluntarily, the application of the proceeds not being because of mutual debts, or a debt in the nature of a running account, the payment constituted an illegal preference.

3. **APPEAL AND ERROR, § 492***—*when erroneous judgment cannot be objected to.* Error in the entry of a judgment in excess of the amount claimed in a declaration is waived when there is no objection in the lower court, since the question cannot be first raised on appeal.

4. **BANKRUPTCY, § 27***—*what evidence admissible to show preference.* In an action against a bank to recover the amount of an unlawful preference, where the defendant claimed that it ceased to make payments on checks because the bankrupt began doing business with another bank, a receipt for money deposited with another bank was properly admitted when its purpose was only to show that the deposit was not general but in trust for creditors.

5. **BANKRUPTCY, § 27***—*when bankrupt's schedule of debts admissible in evidence.* In an action against a bank to recover the amount of an alleged unlawful preference, the admission in evidence of the schedule of debts and creditors filed in the bankruptcy

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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court, while unnecessary was not error, the effect of the evidence being properly limited by the instructions.

6. APPEAL AND ERROR, § 1632*—*when improper remark of counsel cured.* In an action to recover the amount of an alleged unlawful preference, a question asked of an attorney as to whether he did not state that a conveyance was worthless if there were other creditors, and his negative answer, were harmless and the ruling of the court in excluding the question and answer on motion operated to remedy the error, had there been any.

Appeal from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed October 16, 1914. Rehearing denied December 2, 1914. *Certiorari* allowed by Supreme Court.

LESLIE J. OWEN and DEMANGE, GILLESPIE & DEMANGE,
for appellant.

LIVINGSTON & BACH and WELTY, STERLING & WHIT-
MORE, for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

This is an action of assumpsit brought by John Y. Chisholm, trustee in bankruptcy of the Clark Grain & Elevator Company, against the First National Bank of Leroy to recover the amount of an alleged unlawful preference under the provisions of the Bankruptcy Act. The declaration contains several counts alleging in various ways that while the Clark Grain & Elevator Company, hereinafter called the Grain Company, was insolvent and within four months prior to its being adjudicated a bankrupt, the defendant received from it a transfer of property or the payment of money to the amount of \$10,000, which it applied on the indebtedness of said Grain Company, and that at the time of the transfer or the payment of the money defendant had reasonable cause to believe that it would thereby obtain a preference over other creditors of the same class contrary to the Bankruptcy Act. A trial before

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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a jury resulted in a verdict and judgment thereon in favor of the plaintiff, which on an appeal to this court was reversed and the cause remanded. *Chisholm v. First Nat. Bank of Leroy*, 176 Ill. App. 382. At the second trial a jury returned a verdict in favor of plaintiff for \$10,718.50, on which judgment was rendered and the defendant again appeals.

The Grain Company, a corporation organized under the laws of Illinois, had been engaged, prior to November, 1910, in buying and selling grain at Argenta. On November 1, 1910, it sold its elevator at Argenta and purchased one at Leroy for \$12,500, paying \$6,000 in cash and giving a mortgage on the property for \$6,500. It also leased another elevator at Leroy and one at Empire. It began the operation of these elevators on November 4, 1910, and on that day made a deposit of \$1,000 with the appellant in a general check and deposit account, known as the Leroy account. On November 21st it borrowed \$1,000 from the appellant, giving its note therefor, and opened a second check and deposit account called the Empire account. The accounts of the Grain Company at the appellant Bank were overdrawn much of the time. The Leroy account was continuously overdrawn from January 17th to February 9th. On February 1, 1911, the Grain Company borrowed \$5,000 from appellant for which it gave its note payable on demand. The Grain Company continued in business until March 22nd, and was declared an involuntary bankrupt May 15, 1911. The Empire account was continuously overdrawn from February 23rd to March 20th, when the overdraft in that account amounted to \$1,438.59.

The Leroy account was continuously overdrawn from February 14th, the overdraft then being \$5,746.68. On March 18th the overdraft was \$4,027.51. It varied from February 14th to March 20th from \$3,500 to \$6,769.87. On March 20th the Grain Company sold its elevator and a crib of corn to Simeon Crumbaugh,

from whom it had bought the elevator, and received two checks, one for \$6,368, the other for \$2,337, which were turned over to the defendant in payment of the \$5,000 note and accumulated interest, \$40, and the balance, \$3,657.50, was deposited in part payment of the overdrafts in the Leroy and Empire accounts. The appellant also received two drafts amounting to \$980 with waybills attached on March 20th. These drafts were applied in reduction of the overdraft. On March 21st other money was deposited by the Grain Company reducing the overdraft to \$300.25.

The questions involved in the case are: (1) Was the Grain Company insolvent? (2) Did the defendant have reasonable cause to believe the Grain Company was insolvent? And (3) did defendant receive money from the Grain Company not in the regular course of business in payment of its debts while the defendant had reasonable cause to believe the Grain Company was insolvent within four months prior to the adjudication in bankruptcy?

It is stated in the argument for defendant: "As a matter of fact it (the Grain Company) was insolvent at the time it opened its account with appellant, but its condition was not known to appellant until after March 20th, 1911." The proof clearly shows that when the Grain Company began business at Leroy the only assets it had were the equity in the elevator and \$1,385. The company at that time owed Thayer & Company a note for \$5,000, with interest from July, 1910, and had corn contracted at Argenta on which it lost between \$2,000 and \$3,000 by a decline in the price of corn. The evidence tends to show that this loss occurred by a shrinkage in the price of corn after the business was begun in Leroy. After buying the elevator the Grain Company expended \$1,171 in improvements on it.

On November 28, 1910, Clark borrowed \$1,063.97 on some life insurance policies on his own life which was deposited to the credit of the Grain Company with

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appellant. On November 30, 1910, the Grain Company borrowed \$2,500 from B. A. Boyd, a grain commission man of Indianapolis, which it deposited with appellant to its credit. The leased elevator in Leroy, containing corn and oats belonging to the Grain Company of the value of over \$6,000, burned February 13, 1911, with only \$500 insurance on the contents, the draft for which was received by the defendant. The net loss resulting from the fire was over \$5,000. The cashier of appellant was present at the fire and was then told of the amount of the insurance. The owner of the leased elevator that burned, causing such a large loss to the Grain Company, was George Dooley, the vice-president of the defendant. The Grain Company sustained heavy losses on corn sold in December, 1910, and January, 1911. Clark, the president of the Grain Company, on December 28, 1910, used \$3,025 of the Company's money in paying a debt of the H. C. Clark Grain Company, a different party from the Clark Grain & Elevator Company, in Oklahoma, for which the Grain Company was in no way responsible, and this was a total loss, as the party for whom it was paid was not financially responsible.

Shortly before the sale of the Elevator to Crumbaugh, the Grain Company at the demand of the defendant that the Grain Company's indebtedness should be reduced, borrowed another sum of \$2,000 from Boyd which was paid to the Bank on its overdraft. For several days before the elevator was sold, the Bank president and Taylor, its cashier, urged that it be given security and that its indebtedness and overdraft be paid. Cassley, the secretary and bookkeeper of the Grain Company, testified that the appellant was so anxious to have its overdraft paid that shortly before the sale of the elevator the cashier of the Bank said the account was worrying him and that he would give Cassley \$100 to get the account transferred to some other bank, and that Cassley said he would do all he

could to transfer the account and that he did talk with Clark about it. The Grain Company offered the Bank a second mortgage on the elevator, stock in the Grain Company and insurance policies on the life of Clark, but the Bank insisted the elevator and the corn in a certain crib be sold and the proceeds applied on the indebtedness. The Bank began and conducted the negotiations, which lasted several days, for the sale of the elevator and corn to Crumbaugh. The evidence shows that the sale was forced through by the appellant, and that appellant urged Crumbaugh to offer \$12,000 for the elevator, that a few months before he had sold for \$12,500, and on which \$1,171 had since been expended by the Grain Company in improvements. After the sale to Crumbaugh of the elevator for \$12,000, and the corn for \$2,337.50, had been agreed upon on Sunday, March 19th, the parties early Monday morning went to Mr. Owen, an attorney at Leroy, to make the conveyances. Clark testified that Owen told the parties—Taylor representing the Bank, Crumbaugh and Clerk representing the Grain Company—before the deed was signed that if there were any other creditors the transaction would not stand, unless there was other property remaining to satisfy the other creditors, and Clark said there was no other property, and that after this statement the deed was executed and the checks drawn, the \$5,000 note paid and the balance credited on the indebtedness. The deed of the elevator and a bill of sale of the corn were recorded in the recorder's office in Bloomington at 9:50 A. M. Monday, March 20th. The checks were drawn by the cashier of the Bank, signed by Crumbaugh and applied on the indebtedness without being intrusted to the custody or possession of the Grain Company. The statement of Clark that the attorney said the transaction would not stand is denied by Taylor, the stenographer of the attorney, and the attorney, the testimony of Taylor being that Clark said

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the Company had grain enough to pay all its debts and have \$900 to \$1,000 left. There is evidence that the appellant had notice that there was other indebtedness and there were various checks outstanding that the appellant had refused to honor. Clark testified that he told Taylor, the cashier, on March 13th that the Company owed Thayer \$5,000 and Boyd \$2,500. This, however, is contradicted by the cashier.

It is not clear from the evidence whether the Grain Company was solvent or insolvent when it began business in Leroy. The proof tends to show that the Grain Company had contracted for 22,000 bushels of corn at Argenta, and that the price of corn declined about ten cents a bushel in November and December, and that there was a loss on the Argenta corn of over \$2,000 when it was delivered in December. If the loss on the Argenta corn occurred after the beginning of the business at Leroy, then the Grain Company was not insolvent until after it had begun business at Leroy, as the \$3,025 paid on an Oklahoma debt of Clark's was not the debt of the Grain Company but was a misappropriation by Clark of the funds of that Company. When the Grain Company was declared bankrupt, and it does not appear to have done any business after March 21st, it was indebted to the amount of \$17,864.63, and had assets of not to exceed \$5,244.85.

The verdict was for the amount of the proceeds of the sale of the elevator and crib of corn to Crumbaugh and the \$980 draft with interest thereon. It was a question for the jury, and the jury was justified in finding from the evidence that on March 20th, when the proceeds of the sale of the elevator and crib of corn to Crumbaugh and the delivery of the drafts for \$980 were obtained, that appellant knew or had reasonable cause to believe that the Grain Company was insolvent, and that in applying the proceeds of the sale of the elevator and crib of corn and drafts appellant would

receive a larger percentage of its debt than other creditors.

It is also contended that the Grain Company was insolvent all the time it did business in Leroy and that the transactions between the appellant and the Grain Company increased the assets of the Grain Company, that the net result of the business was beneficial to the Grain Company. The facts show that the assets were very much diminished and the debts very much increased while the business was run in Leroy. Appellant only claims that the deficiency of the Grain Company's assets to pay its debts was \$1,000 in November, 1910, while when it was declared a bankrupt the deficiency was about \$12,000.

It is also insisted that the appellant had the right to apply the deposits to the debts of the Grain Company and that the application, as made, did not constitute an illegal preference. The debts were not mutual debts, or in the nature of a running account, but the sale of the elevator, the crib of corn and the receipt of the two drafts were made for the purpose of applying such proceeds on the Grain Company's debt at the insistent demand of appellant and not voluntarily by the Grain Company. A payment of debts so obtained constitutes an illegal preference. *In re Mohr Contracting Co.*, 157 Fed. 469; *In re V. & M. Lumber Co.*, 182 Fed. 237; *Ernst v. Mechanics' & Metals Nat. Bank*, 201 Fed. 664, 120 C. C. A. 92.

It is also contended that the trial court erred in rendering judgment on the verdict for \$10,718.50 when the damages claimed in the declaration are \$10,000. The appellant has waived all errors in that regard by not having raised any question concerning it in the trial court. That question may not be first raised in an Appellate Court. *Wheatley, Buck & Co. v. Chicago Trust & Savings Bank*, 167 Ill. 480; *Leathe v. Thomas*, 218 Ill. 246.

On March 20, 1911, at the time the elevator and crib of corn were sold, the Grain Company was shelling

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and shipping other corn. Four cars had been loaded and billed for shipment. The bookkeeper testified that immediately after the proceeds of the elevator and crib of corn had been applied on the indebtedness, the cashier of appellant went to the grain office and insisted that the bills of lading and drafts on the four cars should be turned over to appellant. The bookkeeper testified that these cars were to be shipped to Boyd on the money he had advanced to the Grain Company, but that the cashier demanded that they be turned over to appellant, and that on his demand two of the drafts, amounting to \$980, and the accompanying bills of lading were turned over to appellant and credited on the overdraft. On March 21st the Grain Company made a deposit of \$1,895, which was applied by the appellant on the overdraft, leaving an overdraft of \$300.25, when the appellant ceased to pay any further checks of the Grain Company.

It is assigned for error that the court erred in the admission and rejection of evidence. It is argued that it was error to admit proof of a receipt for money deposited with another bank by the Grain Company after the receipt of the sums by appellant which appellee claims were preferences. Appellant claimed that it ceased to pay checks after it received the alleged preferences because the Grain Company had begun doing business with another bank. The receipt was admitted for the purpose only of showing that the deposit was not a general deposit but was in trust for the creditors. It is also contended that it was error to admit in evidence the schedule of debts and creditors filed in the bankruptcy court because insolvency was admitted. While such evidence was not necessary, it was not necessarily erroneous, and the court instructed the jury at the request of appellant to disregard any evidence proving or tending to prove the existence of any indebtedness of the Grain Company which arose after making the deposits in question, and that the

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bankruptcy schedule is not to be regarded in so far as it proves or tends to prove any debts of the Grain Company which arose after making the deposits in question.

It is further contended that a question put to the attorney, who drew the conveyances of March 20th, whether he did not state at a meeting of the creditors five days after the making of the conveyances that if the Grain Company had any other creditors the conveyance was not worth the paper it was written on. The attorney answered that he did not, and on motion of appellant the question and answer were excluded. The question and answer were harmless, and the ruling of the court remedied any error there might have been if the answer had been other than it was. Complaint is made concerning some other rulings on evidence, but on examination we do not find any reversible error.

Error is also assigned on the giving and modifying instructions, but we find the jury were fully and properly instructed.

Finding no reversible error in the case, the judgment is affirmed.

Affirmed.

A. H. Miller and A. E. Foster, Appellees, v. Joseph A. Miller, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Douglas county; the Hon. SOLON PHILBRICK, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed October 16, 1914. Rehearing denied November 6, 1914.

Statement of the Case.

Action in assumpsit by A. H. Miller and A. E. Foster against Joseph A. Miller to recover \$480 claimed to be

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due on account of services performed in finding a purchaser for an eighty acre tract of land. The case was tried three times in Moultrie county and new trials granted, after which the case was transferred to Douglas county by a change of venue. It appeared that the defendant agreed to pay \$1 per acre commission for selling the land and all the plaintiffs could get above the price of \$150 per acre. A purchaser was procured who agreed to pay \$155 per acre, but such purchaser abandoned the contract and forfeited the first payment of \$400. At the close of the plaintiff's evidence, the defendant not offering any evidence, the court instructed a verdict for plaintiff for \$94.30, being the commission of \$1 per acre and interest. Both parties moved for a new trial, and the motions being overruled, judgment was entered whereupon the defendant appealed.

At the April term the Appellate Court reversed and remanded the case on the plaintiff's assignment of cross-errors. A petition for rehearing was filed and granted. Afterwards the appellees notified the court that such petition was not filed within the time prescribed by the rule of court, and should not have been allowed, but no motion to strike the petition was made.

JACK & WHITFIELD, for appellant.

E. J. MILLER and F. M. HARBAUGH, for appellees.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

Abstract of the Decision.

1. **VENDOR AND PURCHASER, § 118***—*when contract may be enforced.* A contract for the sale of land which stipulates for the payment of liquidated damages in case of failure to perform, but which is not in the alternative, and does not contain any provision

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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that it shall become null and void on the failure to perform any of its conditions, is not an optional contract, and its performance may be enforced.

2. BROKERS, § 65*—*when brokers entitled to compensation.* Where real estate brokers produced a purchaser ready, able and willing to buy land at the price fixed, they were entitled to compensation for their services, and when the agreement provided that the brokers were to be entitled to an additional sum if the price exceeded that asked by the seller, they would be entitled to such excess when the sum was paid, but an action for the excess could not be maintained until the money was paid.

3. BROKERS, § 99*—*when instruction as to amount of compensation erroneous.* In an action for commissions for procuring a purchaser for real estate, the refusal to give an instruction assessing damages, as requested, was proper, where the amount stated was more than the *ad damnum*, and such amount stated was not due under the contract.

4. APPEAL AND ERROR, § 1156*—*when rehearing may be permitted though petition not filed in time.* While the granting of a rehearing may be erroneous because the petition therefor is not filed in time, the court has control over its judgments during the term at which they are entered, and such rehearing may be allowed to stand as granted on the court's initiative.

Martin Underwood, Appellee, v. C. C. Ankrum and Ida R. Ankrum, Appellants.

(Not to be reported in full.)

Appeal from the Circuit Court of Vermilion county; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the October term, 1913. Reversed. Opinion filed October 16, 1914.

Statement of the Case.

Action commenced before a justice of the peace by Martin Underwood against C. C. Ankrum and Ida R. Ankrum to recover damages for the alleged wrongful closing of a public highway, thereby depriving plaintiff and his customers of access to a coal mine, whereby he

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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sustained damages to his coal business. Plaintiff obtained a judgment before the justice, and on appeal, in the Circuit Court a verdict for fifty dollars was returned in his favor, on which judgment was entered, whereupon the defendants appealed.

H. M. STEELEY and H. M. STEELEY, JR., for appellants.

ISAAC A. LOVE, for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

Abstract of the Decision.

1. JUSTICES OF THE PEACE, § 36*—*how jurisdiction of justice determined.* The jurisdiction of a justice of the peace is limited to cases in which jurisdiction is given in art. XI, § 16 of the Justice's and Constable's Act. J. & A. ¶ 6877.

2. JUSTICES OF THE PEACE, § 64*—*what action cannot be brought before justice.* An action for wrongfully closing a public highway, where the only remedy is by a suit in case, and the damages sued for are neither an injury to real estate nor to personal property, is improperly brought before a justice of the peace, since such justices have no jurisdiction in actions on the case.

3. ROADS AND BRIDGES, § 200*—*what is nature of proceeding to recover penalty for obstructing road.* A proceeding in the name of a town to recover a statutory penalty for obstructing a highway is in the nature of a criminal action.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People of the State of Illinois, Defendant in Error, v. Robert Johns, Plaintiff in Error.

(Not to be reported in full.)

Error to the City Court of Pana; the Hon. J. H. FORNOFF, Judge, presiding. Heard in this court at the April term, 1914. Reversed and remanded. Opinion filed October 16, 1914.

Statement of the Case.

An indictment returned by a grand jury of the city of Pana charged Robert Johns with having made an assault with a deadly weapon, to wit, an iron seal, upon William H. Alexander with intent to inflict bodily injury, no considerable provocation appearing. A second count charged an assault made "under circumstances showing an abandoned and malignant heart and no considerable provocation appearing." At the trial the evidence showed that the complaining witness and defendant, with other parties, were engaged in an oil enterprise; that defendant had obtained a lease of oil lands which had been assigned to the company; that such lease was in the possession of the secretary of the company, and that the assault occurred when an altercation arose, as to the possession of such lease, at a meeting of some of the parties.

The jury returned a verdict of guilty of assault with a deadly weapon with intent to inflict a bodily injury, the circumstances showing an abandoned and malignant heart. The court overruled a motion for a new trial and assessed a fine of five hundred dollars against the defendant, who brought error.

JOHN E. HOGAN and J. W. PREIHS, for plaintiff in error.

HARRY B. HERSHEY and W. B. McBRIDE, for defendant in error; E. E. DOWELL, of counsel.

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MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court

Abstract of the Decision.

1. ASSAULT AND BATTERY, § 38*—*when penalty excessive*. On a prosecution for assault, where it appeared that such assault occurred during an altercation as to the possession of a lease, and the complaining witness was a partner in a conspiracy to get possession of the lease whether he was entitled to it or not, there was such provocation that a fine of five hundred dollars was excessive.

2. ASSAULT AND BATTERY, § 33*—*what instructions improper*. On a prosecution for assault, the action of the court in telling the jury what the penalty was for the offense charged, when giving instructions, was improper, as such penalty was a matter with which the jury had nothing to do.

3. ASSAULT AND BATTERY, § 24*—*what may be considered in determining provocation*. Words coupled with acts which are admitted to have been done in the carrying out of a conspiracy to obtain possession of property from other parties may be considered in determining whether an assault was without considerable provocation, where want of such provocation is a material averment of the indictment.

4. ASSAULT AND BATTERY, § 33*—*when erroneous instruction harmless*. On a prosecution for assault, the giving of an erroneous instruction as to provocation is harmless, where the jury by their verdict acquitted the defendant of the charge of assault with intent to inflict bodily injury, no considerable provocation appearing.

5. ASSAULT AND BATTERY, § 33*—*when instruction misleading*. On a prosecution for assault, the giving of an instruction that where personal property is wrongfully withheld from an owner, such owner can obtain possession by peaceable means, or if it comes to his hands he has a right to hold it against the world, was erroneous, being an abstract proposition which, under the facts, was misleading.

6. ASSAULT AND BATTERY, § 33*—*when instruction as to evidence improper*. On a prosecution for assault, the giving of an instruction that the jury might disregard the evidence of the accused if he wilfully testified falsely to any material fact was error, as the instruction should have been made general and applicable to all witnesses.

7. ASSAULT AND BATTERY, § 33*—*when instruction not justified by evidence*. On a prosecution for an assault arising out of an attempt to obtain possession of a lease, the giving of an instruction submitting the question of how the lease was taken was error, since the court had excluded evidence as to such issue.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

E. F. Colwell, Appellee, v. S. J. Swick, Appellant.

1. REPLEVIN, § 10*—*what is nature of statute.* Section 2 of the Replevin Act (chapter 119, J. & A. ¶ 9187) prohibiting actions of replevin at the suit of the defendant in execution, and section 4 of such Act (J. & A. ¶ 9189) requiring an affidavit that the goods were not seized under any execution, are mostly declaratory of the common law.

2. JUSTICES OF THE PEACE, § 117*—*when judgment must be rendered.* A justice of the peace at the conclusion of a trial before him must either render judgment or continue the cause to some definite time when he shall render judgment; and if he takes the case under advisement indefinitely, a judgment subsequently rendered by him is a nullity.

3. EXECUTION, § 33*—*when execution void.* An execution issued on a judgment of a justice which is void because of his taking the case under advisement indefinitely, is unauthorized and void.

4. REPLEVIN, § 10*—*what property may be replevied.* As a general rule, neither the defendant in execution nor any one claiming under him can maintain replevin against an officer levying an execution, as the property is in the custody of the law.

5. REPLEVIN, § 10*—*when property taken under execution may be replevied.* A writ in the form of an execution, which is void because the judgment on which it is issued is void is not an execution, and the party named therein may replevy property attempted to be taken under such void writ.

Appeal from the Circuit Court of Christian county; the Hon. THOMAS M. JETT, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914.

J. A. MERRY, for appellant.

DRENNAN & BULLINGTON, for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

In May, 1913, S. J. Swick, a constable, by virtue of an execution issued by a justice of the peace, levied on certain chattel property belonging to E. F. Colwell. Colwell began a replevin suit before a justice of the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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peace to retake the property. A writ was issued and the property replevined. An appeal was taken from the judgment before the justice to the Circuit Court, where a motion was made to dismiss the case on the ground that there was no sufficient affidavit and that the writ was issued without authority of law.

The motion to dismiss was overruled and the case was then tried by the court without a jury. The court found for the plaintiff and judgment was rendered that he is entitled to the possession of the property replevined and for costs. The defendant appeals.

There is no controversy over the facts. William Waterman brought suit in a justice's court against Colwell. The summons was returnable November 15th. On the return day the case was continued to November 16th, at 1 P. M., when the trial was begun. The docket contains this entry: "Trial heard and court takes the case under advisement. After examining court reports the court found in favor of plaintiff. Judgment Twenty-five Dollars and costs of said suit." Signed by the justice. The execution issued on this judgment was the execution levied on the property of appellant which he replevined. The affidavit for replevin as filed before the justice contained the statutory requirements except that it stated that the property had not been seized under any *valid* execution. The affidavit was amended in the Circuit Court by striking out the word "valid." The second section of the Replevin Act (chapter 119, J. & A. ¶ 9187) provides: "No action of replevin shall lie at the suit of the defendant in any execution or attachment to recover goods or chattels seized by virtue thereof, unless such goods and chattels are exempted by law. * * *". The fourth section (J. & A. ¶ 9189) provides: "The person bringing such action shall before the writ issues file * * * an affidavit showing that the plaintiff in such action is the owner * * * that the same has not been taken for any tax * * * nor seized

under any execution or attachment against the goods and chattels of such plaintiff liable to execution * * *.” These provisions of the statute are mostly declaratory of the common law. The question at issue is, had the goods been seized under an execution against the plaintiff within the contemplation of the statute?

It is contended that because the justice took the case in which the execution was issued under advisement, without fixing a time at which he would dispose of it, he lost jurisdiction and the judgment rendered and execution issued thereon are void, and that the replevin was not of property that had been taken on execution. The rule is that a justice of the peace, at the conclusion of a trial before him, must either render judgment or continue the cause to some definite time when he shall render judgment. If he takes the case under advisement indefinitely, a judgment subsequently rendered by him is a nullity. *Hall v. Reber*, 36 Ill. 483; *Murray Bros. v. Churchill & Co.*, 86 Ill. App. 480. The record of the justice’s judgment in the case in which the execution was issued shows that after the trial was finished the case was taken under advisement indefinitely. No time was fixed when the parties were to meet to hear the judgment rendered. The docket does not show when the judgment was rendered. The postponement being to an indefinite time, the judgment is a nullity and void. There was no judgment on which an execution could issue, and the purported execution was therefore unauthorized and void. *Ling v. Henry W. King & Co.*, 91 Ill. 571; *Cummins v. Holmes*, 109 Ill. 15.

Appellant cites *McClaghry v. Cratzenberg*, 39 Ill. 117, and *Heagle v. Wheeland*, 64 Ill. 423, and contends that these cases decide the question involved. In the *McClaghry* case, *supra*, the affidavit stated that the property had not been taken for “any legal tax.” The party suing out the replevin sought to test the validity

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of an act of the legislature, which manifestly could not be done in that way. In the *Heagle* case, *supra*, the original owner of property, which had been sold for the payment of a penalty or fine against the property taken up for running at large, in which notice to the unknown owner had been given by posting, sued out the writ to retake the property from the purchaser at the sale. The statute in force at the time that decision was rendered provided that the affidavit must state that the goods had not been taken for any tax, assessment or fine levied by virtue of any law of this State. The party suing out the writ recovered judgment for the possession of the property sold to pay a fine, and the Supreme Court affirmed the judgment on the ground that the justice's judgment was void because the justice did not have jurisdiction and for the reason that the property was not in the custody of the officer but had been sold on an execution or order from the justice, the penalty having been assessed in favor of a town by a justice residing in the town, which at that time was prohibited by statute. A further reason for affirming the judgment was that the property replevied was not in the custody of the officer but had been sold to a third party from whom it was replevied.

The question of whether property attempted to be levied on under a void execution, or an execution issued on a void judgment, can be replevied by the owner of the property, who is the judgment debtor in the void judgment and execution, has never, that we can find, been squarely decided in this State. The question decided in the *Heagle* case, *supra*, however, has some analogy to this case. At common law it was contempt of the court issuing an execution, for the judgment debtor to replevy property taken under it. The general rule is well settled that neither the defendant in execution nor any one claiming under him can maintain replevin against an officer levying an execution,

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for the reason the property is in the custody of the law. Freeman on Executions, sec. 268; 34 Cyc. 1368. The rule is also announced by the courts of some States that where the judgment on which an execution issued is void, the defendant may maintain replevin for goods seized thereunder against the officer making the levy; and this is so, although the execution is regular on its face. 34 Cyc. 1369; *Adams v. Hubbard*, 30 Mich. 103; *Balm v. Nunn*, 63 Iowa 641; *Karr v. Stahl*, 75 Kan. 387; *Iron Cliffs Co. v. Lahais*, 52 Mich. 394; *Breckenridge v. Johnson*, 57 Miss. 371; *Muller v. Plue*, 45 Neb. 701; *George v. Chambers*, 11 M. & W. 149 (Eng.).

“A void judgment is in legal effect no judgment. From it no rights can be obtained, being worthless in itself all proceedings founded on it are equally worthless. It neither binds nor bars any one. All acts performed under it, and all claims flowing out of it are void.” Freeman on Executions, sec. 20; *Campbell v. McCahan*, 41 Ill. 45.

We are of the opinion that a writ in the form of an execution, which is void for the reason the supposed judgment on which it is issued is void, is not an execution, and that the party named therein may replevy property attempted to be taken under such void writ. A constable, a ministerial officer, is ordinarily not liable for damages for serving a writ, which is regular on its face and does not disclose a want of jurisdiction. *Tuttle v. Wilson*, 24 Ill. 561; *Housh v. People*, 75 Ill. 487. It is insisted by appellant that the remedy of the appellee is by a suit in trespass or trover against the person at whose instance the supposed execution was issued. If that party should be irresponsible then appellee, whose property has been taken by a void writ, would be remediless. The judgment is affirmed.

Affirmed.

Morrison v. Elzy, 190 Ill. App. 374.

Fred Morrison, Appellant, v. W. J. Elzy et al., Appellees.

1. CHATTEL MORTGAGES, § 29*—*what is effect of incorrect description of property.* An incorrect description of a part of the property included in a chattel mortgage will not invalidate the mortgage as to the part correctly described.

2. CHATTEL MORTGAGES, § 30*—*when description of property sufficient as notice.* If the description of property in a chattel mortgage is such as will enable third persons to identify the property, aided by inquiries which the mortgage indicates, then the mortgage is constructive notice to parties even who purchase in good faith.

3. CHATTEL MORTGAGES, § 30*—*what is effect of false description of property.* A description of property in a chattel mortgage which is wholly false voids the mortgage.

4. CHATTEL MORTGAGES, § 100*—*when mortgagee estopped to deny validity of prior mortgage.* Where a chattel mortgage to a bank described the cattle mortgaged as being subject to a prior mortgage, and the agent of the bank was informed by the mortgagor about the cattle being covered by the prior mortgage, such bank was in no better position than the mortgagor to object to the partially inaccurate description in the prior mortgage; and since the bank only received a conveyance of the equity of the mortgagor, it was estopped to deny the title of the prior mortgagee.

5. CHATTEL MORTGAGES, § 269*—*when proceeds of sale should be held in trust.* Where a bank was the holder of a second chattel mortgage and knew of the prior mortgage on such chattels, and it consented to a sale of the chattels and received the proceeds of the sale by virtue of its mortgage, such proceeds were held in trust for the holder of the first mortgage.

6. APPEAL AND ERROR, § 1096*—*what brief should contain.* Briefs and arguments containing insinuations reflecting on the trial court should, on motion, be stricken from the records.

Appeal from the Circuit Court of Shelby county; the Hon. ALBERT M. ROSE, Judge, presiding. Heard in this court at the April term, 1914. Reversed and remanded with directions. Opinion filed October 16, 1914. Rehearing denied December 2, 1914. *Certiorari* denied by Supreme Court (making opinion final).

Statement by the Court. On October 15, 1910, W. J. Elzy bought from Fred Morrison sixty-one head

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

of steers for \$2,767.84, for which he gave Morrison a note bearing seven per cent. interest, payable July 1, 1911. To secure the payment of this note Elzy gave a chattel mortgage on these cattle in which the mortgaged property is described as "61 head of 2 yr. old short-horn steers." The mortgage was properly acknowledged and recorded.

On January 21, 1911, Elzy gave a promissory note to J. E. Dazey for \$1,557.55, due four months after date with interest at seven per cent. This note was secured by a chattel mortgage on "sixty-two head of coming three year old steers, consisting of Hereford, Polled Angus and Short-Horn stock, subject to a former mortgage to Fred Morrison."

On May 22, 1911, Elzy renewed the note and mortgage to Dazey, the new note being for \$1,593.90, due sixty days after date. The new chattel mortgage to Dazey described the stock the same as it was described in the first mortgage to him, and recited that it was given subject to a former mortgage to Fred Morrison.

Dazey was cashier of the First National Bank of Findlay, and the notes and mortgages were given to him for the bank and were indorsed by him to the bank without recourse.

On June 6, 1911, sixty-two head of steers and five cows were shipped by Elzy to the stock yards in Chicago for market. Dazey and Elzy were both in Chicago at the stock yards when the cattle were sold. The net proceeds of the sale of the cattle after deducting freight and expenses were \$3,797.91. The proceeds of the sale of the cattle on Dazey's demand were placed in the Ft. Dearborn Bank to be placed to the credit of Elzy in the First National Bank of Findlay. Morrison had no knowledge of the Dazey mortgage or the shipping of the cattle to Chicago.

The First National Bank of Findlay on June 8th credited Elzy's account with \$3,587.65, the proceeds of the sale of the steers, and charged against Elzy's ac-

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count \$1,600, the amount due on the note and mortgage given to Dazey; on June 12th it charged to Elzy's account \$200, that was due on a demand note executed by Elzy to Dazey and indorsed to the bank May 15, 1911, and \$325, the principal of a note given by Elzy to the bank dated March 11, 1911, due June 11, with interest at seven per cent. after due.

On June 10, 1911, the Farmers' Bank of Gays, which had recovered a judgment against Elzy for \$522.21, caused a summons in garnishment to be issued and served on the First National Bank of Findlay as garnishee of Elzy. The bank answered in the garnishment suit that it had on deposit \$522.21 in the name of Elzy.

Morrison learned of the sale of the cattle and immediately went to Elzy and the Bank of Findlay and demanded that his note be paid from the proceeds of the sale of the steers. The officers of the bank told him that it had applied the proceeds on the payment of its mortgage note and other notes held by it and that it had been served with garnishee process for \$522.21, and gave Elzy a check for \$910.44, claiming that was the balance it had to Elzy's credit. This check Elzy gave to the attorney for Morrison.

In October, Morrison brought suit at law against the First National Bank of Findlay to recover for money had and received for his use. At the November term, after the trial of this suit had been begun, it was transferred from the law to the chancery docket with leave to plaintiff to file a bill in equity and make new parties.

A bill in equity was filed by Morrison in which the First National Bank of Findlay, Elzy, Dazey, The Farmers Bank of Gays and the stock dealers in Chicago, who bought the cattle, were made parties defendant to the bill. It sets forth the facts hereinbefore stated, alleges fraud on the part of the First National Bank of Findlay and Elzy, and that complain-

ant is not able to designate accurately, by reason of the mingling and adding to the number of cattle that complainant's mortgage covers, what proportion of the money the sixty-two steers sold for, the sixty-one head of cattle mortgaged to complainant brought, nor the proportion of the expenses chargeable to each, and prays that complainant may have a prior lien on the proceeds of said cattle sold and that the claims of the parties be marshaled.

The several defendants answered the bill. The answer of the First National Bank of Findlay and Dazey admits the taking of the notes and mortgages from Elzy to Dazey and by him assigned to the bank, and denies that the mortgages assigned to the bank were on the same cattle that were included in the Morrison mortgage. The answer denies all fraud, and sets up the garnishment proceedings. The Farmers Bank of Gays adopted the answer of the Bank of Findlay.

Elzy answered admitting the giving of the notes and mortgages, but denies that the mortgages cover the same property; states that the claims of complainant against him have been fully settled and paid by the sale to complainant of cattle, mules and other property, and that the claims of complainant against him have also been settled by a discharge of the defendant in a proceeding in bankruptcy. Replications were filed and at the trial the evidence was heard in open court. A decree was entered dismissing the bill for want of equity, from which Morrison appeals.

CHAFEE & CHEW, J. G. BURNSIDES and GEORGE B. RHOADS, for appellant.

WHITAKER, WARD & PUGH and E. A. RICHARDSON, for appellees.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

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The question in this case is whether the mortgage given by Elzy to Morrison on sixty-one steers was such as will hold the proceeds of the sale of the stock which were received by the First National Bank of Findlay. The evidence shows that the description of the stock was not such that it could all be identified by a third party. The description in the Morrison mortgage is: "61 head of 2 yr. old short horn steers." The proof shows that the cattle were of mixed stock. The greater number of the steers were red or roan two years old, which were half or more than half short horns. There were a number of the steers in which Hereford or Polled Angus was the prevailing type. They were all two-year-olds, and were lotted in Chicago, and sold as short horns or Herefords.

Dazey, the cashier of the bank to whom the mortgage and note assigned to the Bank of Findlay were given, had no interest in them. The description of the property is the same in both mortgages given to Dazey and both contain the provision that they are given subject to a former mortgage to Morrison. The agent of the bank who made the loan and accepted the mortgage was told at the time that Morrison had a prior mortgage on the stock on which the bank was taking a mortgage.

The joint answer of the bank and Dazey states, "that many, if not all of the cattle so shipped were not mentioned in any of said mortgages unless it be that they were mentioned in the last mortgage given to the said Dazey," and "alleges that said Dazey hearing of a proposed shipment of cattle by the said Elzy from Findlay to Chicago, went to Chicago for the purpose of protecting the rights of the First National Bank of Findlay, if need be, in the mortgage which it then held executed by the said Elzy and for no other purpose." The record shows that the same counsel appear for, filed the answers for and represent the bank, Dazey and Elzy.

The preponderance of the proof is that the steers sold by Morrison to Elzy were kept on a farm, known as the Lanham farm, with some younger cattle and that none of the Morrison cattle were sold at the public sale that Elzy had in December, 1910; that these cattle were included in the Dazey mortgage with another steer; that the steers sold in Chicago by Elzy were the ones he bought of Morrison, and that Dazey, in the stock yards at Chicago, demanded by virtue of the mortgage held by the bank that the proceeds of the sale of the cattle in Chicago be deposited in the Bank of Findlay, when Elzy stated that the Morrison mortgage on these cattle must be paid. The conclusion is inevitable that the Bank of Findlay received the proceeds of the cattle only because of its second mortgage.

The settlement of the Chicago commission house that sold the stock shows that sixty-six cattle were sold for Elzy on June 7th for \$3,941.89, of which five were cows sold on the account of a neighbor for \$251.24; that the expenses of the sale including freight and commissions were \$143.98; and that the net proceeds of the sale of the sixty-one steers were \$3,546.17, without making any deduction from the expense account for the expenses chargeable against the five cows. From this statement it would appear that only sixty-one steers were shipped to Chicago.

An incorrect description of a part of the property included in a chattel mortgage will not invalidate the mortgage as to the part correctly described. If the description of the property in a chattel mortgage is such as will enable third persons to identify the property, aided by inquiries which the mortgage indicates, then the mortgage is constructive notice to parties even who purchase in good faith. A description wholly false voids the mortgage, but if a part of the description only is false, this may be rejected and the mortgage will take effect, if the remainder of the descrip-

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tion is sufficient, aided by inquiries which the mortgage suggests, to enable the property to be identified. *Boyle v. Miller*, 93 Ill. App. 627, 5 Am. & Eng. Encyc. of Law, 958; 6 Cyc. 1036. "Persons with actual knowledge of the property covered by the mortgage stand in no better position than the mortgagor in respect to their right to object to an insufficient description." 6 Cyc. 1023, and authorities there cited.

Such of the steers as were grade short horns were accurately described. All the steers were described as two-year-olds. These steers included in the Morrison mortgage were all two-year-olds and were kept and fed by themselves, except that there were some yearling cattle with them.

The mortgage to the bank described the cattle mortgaged to it as subject to the Morrison mortgage. The agent of the bank who took its mortgages having been informed by Elzy at the time the first bank mortgage was taken about the cattle being covered by the Morrison mortgage, the bank stands in no better position than Elzy to object to the partially inaccurate description in the Morrison mortgage. The bank is estopped to deny the title of Morrison for the reason that all the title the bank received was a conveyance of the equity of Elzy. The bank being represented at the sale in Chicago, consenting to it and receiving the proceeds of the sale of the mortgaged cattle by virtue of its mortgage, must be held to hold the proceeds in trust for the holder of the first mortgage. The net proceeds of the sale of the cattle sold in Chicago were more than the amount due on the Morrison note, and the balance unpaid on that note must be paid from the proceeds of the sale.

There is an issue in the case as to whether or not Morrison was paid anything on the note dated October 15, 1910, by the purchase of stock at the sale held by Elzy in December, 1910. Morrison testified that the price of the cattle and other property bought by him

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at that sale was credited on a \$2,000 note and mortgage held by him against Elzy, while Elzy testified that it was credited on the note of October 15, 1910. We express no opinion concerning this issue.

Counsel for appellant in their original argument and in their reply have gone out of the record to abuse the trial court by insinuations reflecting on the court which are unseemly and unprofessional. Such practice should not be passed by without comment. Briefs and arguments containing such insinuations, on motion, should be stricken from the files.

The decree is reversed and the cause remanded with instructions to state the account as to the amount due and unpaid on the note of October 15, 1910, and to render a decree for the balance due on that note to be paid by the First National Bank of Findlay out of the proceeds of the sale of the sixty-one steers covered by the mortgage given by Elzy to Morrison.

Reversed and remanded with directions.

Calvin Petty, Appellee, v. Hugh Maddox, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Coles county; the Hon. WILLIAM B. SCHOLFIELD, Judge, presiding. Heard in this court at the April term, 1914. Reversed and remanded. Opinion filed October 16, 1914.

Statement of the Case.

Suit begun before a justice of the peace by Calvin Petty against Hugh Maddox to recover damages for the killing of a horse belonging to plaintiff which was struck, while running at large on a public highway in the country about midnight, by an automobile driven by the defendant. An appeal was taken from the

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judgment of the justice to the Circuit Court, where a jury returned a verdict in favor of plaintiff for \$128, on which judgment was rendered, and the defendant appealed.

CHARLES C. LEE and F. C. WINKLER, for appellant. . .

T. N. COFER, for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

Abstract of the Decision.

1. INFANTS, § 36*—*what is effect of failure to appoint guardian ad litem.* While a judgment against a minor, where no guardian *ad litem* has been appointed, is not void but only voidable, no steps in a case should be taken against a minor until a guardian *ad litem* has been appointed, where a guardian does not appear and defend for him.

2. AUTOMOBILES AND GARAGES, § 3*—*what instructions are proper in action for death of horse.* In an action for the killing of a horse by an automobile, an instruction requiring the operator of an automobile to use such care and caution as to prevent injury to the person or property of other persons, and rightfully on the highway, was erroneous as making such operator an insurer of the property of others.

3. AUTOMOBILES AND GARAGES, § 2*—*what is duty of operator of automobile.* An operator of an automobile is required to use ordinary and reasonable care in the running of the machine, and must not drive it at greater speed than is reasonable and proper, having regard to the traffic and use of the highway.

4. AUTOMOBILES AND GARAGES, § 2*—*what speed excessive.* The operation of an automobile at a rate of speed exceeding twenty-five miles an hour in the country is prima facie evidence of negligence.

5. AUTOMOBILES AND GARAGES, § 3*—*when instruction in action for injuries erroneous.* In an action for the killing of a horse by an automobile, the giving of instructions argumentative in their nature and which required the jury to consider certain things, "if shown by a preponderance of the evidence together with all facts and circumstances that may be proven by a preponderance of the evidence," was error, as the jury should consider not only such facts as are shown by a preponderance of the evidence but all the evidence and facts and circumstances in evidence.

SCHOLFIELD, J., took no part in this decision.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Lee v. Toledo, St. Louis & Western R. Co., 190 Ill. App. 383.

Mary E. Lee, Administratrix, Appellee, v. Toledo, St. Louis & Western Railroad Company, Appellant.

1. MASTER AND SERVANT, § 582*—*what must be shown to prove negligence, under Federal Employers' Liability Act.* In an action under the Federal Employers' Liability Act for the death of a locomotive fireman caused by a derailment, the plaintiff was not required to prove the exact point where the locomotive left the track nor that, beyond a doubt, it was derailed because of defective ties, and since the evidence showed a large percentage of rotten ties, it was a legitimate inference that the train was derailed by the rails spreading or giving away because the ties did not properly support them, wherefore a verdict of negligence was supported by the evidence.

2. MASTER AND SERVANT, § 622*—*what evidence is admissible to show negligence.* In an action for the death of a locomotive fireman caused by a derailment, evidence of the condition of the ties that were splintered and mashed by the engine was competent, when confined to the ties under the train and which it had passed over.

3. MASTER AND SERVANT, § 622*—*what conditions may be shown to prove negligence.* In an action for the death of a locomotive fireman caused by a derailment, the parties were permitted to show the condition of the roadbed at the time of, prior to and immediately after the accident, but evidence of what was done after the accident was not admissible, since if changes were made they were apt to be interpreted as an admission of negligence, and if the defendant was permitted to offer evidence on such question, the plaintiff would be entitled to rebut such evidence, and it would raise an immaterial issue.

4. MASTER AND SERVANT, § 622*—*when cross-examination improper.* In an action for the death of a locomotive fireman caused by a derailment, where a witness testified to the condition of the road just prior to the accident, a question asked of such witness as to what was done five years prior to that time was not proper cross-examination, and such question was properly excluded.

5. MASTER AND SERVANT, § 666*—*what evidence as to cause of accident improper.* In an action for the death of a locomotive fireman caused by a derailment, it was not error to sustain an objection to a question put to an expert witness as to what was the cause of the accident, as such cause was an issue for the jury.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Appeal from the Circuit Court of Coles county; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914.

M. A. TIPSWORD and C. E. POPE, for appellant;
CHARLES A. SCHMETTAU, of counsel.

S. S. ANDERSON and H. A. NEAL, for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

Mary E. Lee, administratrix of the estate of Robert E. Lee, deceased, brought this suit to recover damages sustained by reason of the death of the intestate averred to have been caused by the negligence of the Toledo, St. Louis & Western Railroad Company.

The declaration consists of one count and avers that on August 23, 1911, the defendant operated a railroad from the city of Charleston, Illinois, to the city of Frankfort, Indiana, and was engaged in interstate commerce; avers the passage of the Federal Liability Act entitled: "An Act relating to the Liability of Common Carriers by Railroad to their employees in certain cases," setting out the act in its entirety; avers that the intestate was a locomotive fireman in the employ of the defendant and was performing his duties on a certain passenger train, engaged in interstate commerce, running from Charleston to Frankfort; that it was the duty of defendant to exercise reasonable care to provide a reasonably safe track on which to operate said train; that in disregard of said duty defendant negligently furnished a defective track with insufficient rails, and rails not properly spiked to the ties and decayed and rotten ties, which defects defendant knew or in the exercise of reasonable care would have known, and that the locomotive by reason of said defects was thrown from the track and the intestate while in the exercise of reasonable care in the perform-

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ance of his duties was killed, etc. A jury returned a verdict for plaintiff for sixty-five hundred dollars, on which judgment was rendered and the defendant appeals.

The evidence shows that Robert E. Lee was a fireman on a locomotive engine that was hauling an east-bound passenger train engaged in interstate commerce, and that the engine left the track and turned over, killing Lee while he was engaged in the line of his duty.

It is contended that there is no proof of negligence on the part of appellant and that the court erred in refusing a peremptory instruction requested by it. The proof shows that the engine and tender and several cars left the track and turned over. The evidence does not disclose with any degree of certainty where the first derailment was. At one place a wheel had run on the top of a rail and marked it for several feet; there is nothing to show whether it was a wheel-mark of the locomotive or the tender or a car. The track was badly torn up for some distance after the train left it and the ties and rails displaced. The evidence of Dr. J. L. White is that "there were no solid ties from the engine back to where it went off the track and there were some defective ties still further back. Ties that wouldn't hold spikes." John Replogle, after testifying that there were many decayed ties, was asked: "What per cent. of the ties where the train apparently left the track and west of there were unsound in your judgment?" and answered that: "There were two-thirds of them that he would not count good ties." This witness further testified that the engine apparently left the track when the rails spread apart twenty-five or thirty feet west of where the rear end of the train was when it was stopped. At this point the ties were rotten; the rails had slipped apart over the rotten end—nothing to hold them. J. M. Simms testified that ninety per cent. of the hardwood ties were decayed; the spikes did not seem to hold; in a por-

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tion of the soft wood ties and spikes had been reset as many as three times. "The section men went along there and marked these ties to be taken out before the wreck. They scalped them with a foot adz, the bad ones. At this point where the derailment was, about half the ties were scalped." Three other witnesses testified to the same effect. Some of the witnesses for appellant testified that some of the ties were in bad condition; there were a good many that were not first class.

There were some witnesses who testified for appellant that there were no rotten ties. Appellant argues that rotten ties are only shown by the evidence to have been in the track where it was torn up, east of where the engine was derailed. As we understand the evidence a large percentage of the ties are shown to be rotten or defective, not only where the track was torn up, but back as far as three hundred feet west of where it was torn up. The appellee did not have to prove the exact point where the locomotive left the track nor that, beyond a doubt, it was derailed because of the defective ties. The proof showing such a large percentage of rotten ties, it is a legitimate inference that the train was derailed by the rails spreading or giving away because the ties did not properly support them and keep them in their proper place. On a review of all the evidence, this court cannot say that the verdict, which was approved by the trial court that saw the witnesses testify, is not sustained by the evidence.

It is contended that the court erred in permitting appellee to show the condition of the ties that were splintered and mashed by the engine and cars after the engine was derailed. The evidence for appellee was confined to the ties that were under the train and west of it. No good reason is shown why everything that pertained to and was a part of the accident in which the intestate was killed was not competent.

It is also assigned for error that the court sustained objections to competent evidence offered by appellant.

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The appellant sought to prove what repairs were made to the roadbed after the accident—that no substantial changes were made. The parties were permitted to show its condition at the time of, prior to and immediately after the accident. Evidence of what was done after the accident is not admissible for the reason that if changes were made they are apt to be interpreted by the jury as an admission of negligence (*City of Bloomington v. Legg*, 151 Ill. 9; *Howe v. Medaris*, 183 Ill. 288; *Chicago P. & St. L. Ry. Co. v. Lewis*, 145 Ill. 67); and if appellant was permitted to offer evidence on that question then appellee would be permitted to rebut such evidence and it would raise an immaterial issue. On the cross-examination of the witness Simms, appellant asked if the roadbed had not been rebuilt in 1906 and 1907. The court sustained an objection to the question. The witness had only testified to the condition of the roadbed just prior to the accident; what was done five years prior to that time was not cross-examination and the ruling was proper.

It is also contended that it was error to sustain an objection to a question put to one of appellant's expert witnesses. "Were you able to ascertain from the observation you made and that others made the cause of the accident?" The cause of the derailment was the issue to be tried by the jury. The court in sustaining the objection remarked it was proper for the witness to tell what he saw and discovered. There was no error in sustaining the objection.

Appellant contends that there was error in giving several instructions given at the request of appellee. On a careful examination, the objections appear to be hypercritical and without merit, and it would serve no useful end to review them at length. Finding no reversible error in the case the judgment is affirmed.

Affirmed.

Heilbrunn et al. v. Ellsworth et al., 190 Ill. App. 388.

Louis Heilbrunn and David Kahn, trading as Heilbrunn & Kahn, Appellants, v. J. J. Ellsworth and Harry McNair, trading as Ellsworth & McNair, Appellees.

1. **PROPERTY, § 27***—*when person is presumed owner.* A party in possession of personal property is presumed to be the owner of it, and where such owner puts another in possession and clothes him with the *indicia* of ownership, he loses his right thereto, as against creditors of that person.

2. **ATTACHMENT, § 360***—*when sureties are estopped from attacking bond.* Obligors on a forthcoming bond are estopped to deny the recitals and admissions in the bond.

3. **ATTACHMENT, § 317***—*what is effect of plea preventing interpleaders from claiming property.* Where certain property and money, seized by a writ of attachment, was released because of the giving of a forthcoming bond, and a partnership interpleaded and claimed the property, a plea that the sureties on the forthcoming bond executed the same at the special instance and request of the interpleaders, and that the undertaking was that of the partnership, was one of estoppel by record or deed, the bond being under seal.

4. **ATTACHMENT, § 317***—*when interpleaders are estopped from claiming property.* Where personal property, seized by a writ of attachment, was released because of the giving of a forthcoming bond, and it appeared that such bond was the undertaking of a partnership which interpleaded and claimed the property, it was not permissible for such partnership or its surety to obtain the property under the outstanding title of a third person, when they had agreed to hold it under the sheriff.

5. **PRINCIPAL AND SURETY, § 8***—*what is extent of liability of surety.* The liability of sureties follows that of the principal, and if the obligation is valid against the principal it is valid against the sureties.

Appeal from the City Court of Mattoon; the Hon. JOHN McNUTT, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914. *Certiorari* denied by Supreme Court (making opinion final).

VAUSE & HUGHES, for appellants.

HENLEY & DOUGLAS, for appellees; SPENCER WARD, of counsel.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

J. J. Ellsworth and Harry McNair, partners doing business under the firm name of Ellsworth & McNair, caused a writ of attachment to be issued out of the Mattoon City Court and levied on certain horses in the possession of William Fink, the defendant in the attachment suit, and about seventeen hundred dollars in the National Bank of Mattoon was also garnisheed as the money of Fink.

Fink gave a forthcoming bond under section 14 of the Attachment Act (J. & A. ¶ 505), with G. S. Richmond and W. H. Ownby as sureties, and the horses levied on were returned to Fink and the money attached in the bank released. Thereafter Louis Heilbrunn and David Kahn, partners doing business under the name of Heilbrunn & Kahn, filed an interpleader in the attachment suit alleging that the money attached and the horses levied on were at the time of the levy and still are the money and property of Heilbrunn & Kahn, and not the property of Fink.

To this interpleader, Ellsworth & McNair filed a plea averring that Heilbrunn & Kahn caused George S. Richmond and W. H. Ownby to become sureties on the forthcoming bond, which was delivered to the sheriff, under and by which the property levied upon was re-delivered to Fink, the defendant in the attachment suit, in whose possession the property was at the time the writ was levied; that said Richmond and Ownby executed said bond as sureties at the special instance and request and by the procuration of said Heilbrunn & Kahn, "which said forthcoming bond was for the use and benefit of and was in law the undertaking of Heilbrunn & Kahn as sureties." The plea further avers that Richmond and Ownby, who so executed said forthcoming bond, executed and delivered the same in their own names, but in fact solely and wholly for and on behalf of Heilbrunn & Kahn. The plea sets forth

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the bond *in haec verba* and concludes, "by reason whereof said Heilbrunn & Kahn became and are now estopped and precluded from claiming or setting up title in any other than said Fink, in any of the property so levied upon or seized by said attachment writ, and this the defendants are ready to verify, etc."

Heilbrunn & Kahn filed a general demurrer to the plea which was overruled, and abiding by their demurrer judgment was rendered against them on the plea that they take nothing by their interpleader, etc., and for costs. Heilbrunn & Kahn prosecute this appeal from that judgment.

The only question raised on this appeal is the sufficiency of the plea of estoppel. The substance of the plea is that the interpleading claimants of the property and money induced and procured Richmond and Ownby to become sureties on the forthcoming bond given to the sheriff, whereby the property attached was redelivered to the defendant in the attachment. The conclusion of the bond is: "Now, if the said property and money shall be forthcoming to answer the judgment of the court in said suit then this obligation to be void. Otherwise to remain in full force and effect."

The party in possession of personal property is presumed to be the owner of it, and where the owner of personal property puts another in possession and clothes him with the *indicia* of ownership, he loses his right thereto, as against creditors of that person. *Gilbert v. National Cash Register Co.*, 176 Ill. 288. The forthcoming bond recites the issuing of a writ of attachment against the estate of Fink. The return on the attachment shows the levying of the writ on the property as the property of Fink. The forthcoming bond recites the issuing of the writ of attachment against the estate of Fink and the levying of the writ on the property as the property of Fink, and that Fink is desirous of regaining possession of the property,

and that the property shall be forthcoming to answer the judgment in said suit.

The obligors on the bond are estopped to deny the recitals and admissions in the bond. *Crisman v. Matthews*, 2 Ill. 148. Obligors and sureties are estopped to set up defenses which contradict the recitals of the bond. *McCarthy v. Chimney Const. Co.*, 219 Ill. 616; *Harding v. Kuessner*, 172 Ill. 125. The plea avers that the sureties on the bond executed the same at the special instance and request and by the procuration of Heilbrunn & Kahn and for their benefit; that it was in law the undertaking of Heilbrunn & Kahn as sureties; and that they executed it solely and wholly for and on behalf of Heilbrunn & Kahn. The bond being under seal, the plea is one of estoppel by record or deed. "It was not admissible for him or his surety to get possession of the property by the execution of the forthcoming bond, and then refuse to deliver it to answer the judgment of the court * * * because it belong to a third person. * * * Neither the defendant nor the surety had a right to benefit himself by claiming to hold the property under the outstanding title of a third person, while they had agreed to hold it under the sheriff." *Gray v. MacLean*, 17 Ill. 404; *Case v. Steele*, 34 Kan. 90; *Sprigg v. Bank of Mt. Pleasant*, 35 U. S. 261.

The liability of the sureties follows that of the principal, and if the obligation is valid against the principal it is valid against the sureties. The demurrer admits the averments of the plea to be true. The plea averring that the sureties gave the bond solely and wholly for Heilbrunn & Kahn, Heilbrunn & Kahn cannot set up a claim to the property any more than the sureties could. The court properly overruled the demurrer of Heilbrunn & Kahn to the plea to the interpleader. The judgment is affirmed.

Affirmed.

Barnes v. Ward, 190 Ill. App. 392.

**H. L. Barnes, Plaintiff in Error, v. Ora Ward et al.,
Defendants in Error.**

1. FRAUDULENT CONVEYANCES, § 109*—*when debtor may prefer creditor.* The right of a debtor to pay one creditor in preference to another, or to transfer property in satisfaction of or to create a lien upon it for the security of a particular debt, in preference to and to the exclusion of other liabilities, always existed at common law.

2. FRAUDULENT CONVEYANCES, § 200*—*when mortgage cannot be set aside.* A bill by a creditor to set aside a third mortgage is properly dismissed for want of equity when it appears that there was a full consideration for such mortgage, since the debtor had the right to secure the mortgagee in preference to the plaintiff creditor.

3. MORTGAGES, § 50*—*when mortgage delivered.* Evidence of delivery of a mortgage to the recorder for the mortgagee, and the delivery of the recorder's receipt and the note to the mortgagee on the same day, is sufficient to show a delivery of the note and mortgage to the mortgagee and an acceptance of them by him.

4. MORTGAGES, § 375*—*when strict foreclosure proper.* As a general rule, strict foreclosures are not favored in equity, but such foreclosure may be allowed where there are other creditors and the property is of less value than the debt, the mortgagor is insolvent and the mortgagee is willing to take the property in discharge of his debt.

5. Costs, § 6*—*when taxation erroneous.* Where a creditor brought a bill to set aside a mortgage he was properly taxable with all costs caused by the filing of the original bill and the trial of the issues made thereon, but it was error to tax costs properly arising out of a cross-bill for foreclosure and the issues thereon to such complainant.

Error to the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the April term, 1914. Affirmed in part, reversed in part and remanded with directions. Opinion filed October 16, 1914.

Statement by the Court. This is a bill in chancery filed January 24, 1912, by H. L. Barnes against Ora Ward, Bernice Ward and J. S. Ward to set aside a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

mortgage dated October 23, 1911, executed by Ora Ward and his wife, Bernice, to his father, J. S. Ward, on thirty acres of land occupied by the mortgagors as their home in McLean county. The bill alleges that Barnes on October 28, 1911, recovered a judgment in the Circuit Court of McLean county against Ora Ward for \$642.56, and on the same date he recovered another judgment for \$2,375.70 against Ora and Bernice Ward; that at the time of the rendition of said judgments Ora Ward was the owner in fee simple of said land subject to two mortgages aggregating \$4,500; that on October 23, 1911, Ora and Bernice Ward, for a pretended consideration of \$4,000, made and recorded a third mortgage upon said real estate to J. S. Ward, father of Ora Ward, thereby disposing of the full value of their equity without any consideration, with intent to defraud complainant and hinder and delay him in the collection of his judgments; that said judgments are for an indebtedness of said Ora Ward that existed before the making of said third mortgage; that on October 28, 1911, executions were issued on said judgments to the sheriff of McLean county commanding him that he cause to be made the sum of \$3,027.26, the amount of said judgments; that said executions were served by said sheriff on the defendants on the day of their date, and are still in his hands unsatisfied; that said note and mortgage dated October 23, 1911, were not delivered to J. S. Ward prior to the rendition of said judgments; that said J. S. Ward is fraudulently holding said mortgage to cover up the property of said Ora Ward; that said Ora and Bernice Ward have no personal property or real estate except the real estate covered by said mortgage; and that said judgments are still in full force and entirely unpaid. The bill calls for answers under oath and to interrogatories thereto attached, and prays that said third mortgage be set aside and declared void. The defendants filed their several answers to said bill, under oath, in which the defendants set up a full con-

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sideration for the \$4,000 note and mortgage dated October 23, 1911, and give the details of the business transactions of the defendants. They allege the delivery of the note and mortgage to J. S. Ward on the day of their date and deny all fraud.

J. S. Ward on March 25, 1912, filed a cross-bill praying for a strict foreclosure of the two prior mortgages and the third mortgage which the original bill prays to have vacated. The cross-bill alleges that cross complainant is the owner of the three notes and mortgages. The first two notes and mortgages were past due before the cross-bill was filed; the third mortgage secures a \$4,000 note due in five years from October 23, 1911. It contains a provision that the mortgagors will cause the buildings on said premises to be insured for their full insurable value and the policy assigned to the mortgagee, and on failure to insure, at the option of the legal holder of said note, the indebtedness secured may be declared due and payable at once. The cross-bill further alleges that the mortgagors have failed to insure said buildings and cross complainant has been compelled to insure them, and that there is now due on said three notes and mortgages \$8,253.19; that said Ora and Bernice Ward are insolvent and said mortgaged premises are meager and scant security and insufficient to pay the amount due. Answers to the cross-bill were filed by Ora Ward, Bernice Ward and H. L. Barnes.

The issues were joined on both bills and the cause was referred to the master to report the evidence with his conclusions. He reported the value of the mortgaged premises to be \$7,500; that there was due J. S. Ward from Ora and Bernice Ward, \$8,603.99 on the three notes and mortgages and that the equities were with the cross complainant and the defendants in the original bill. The complainant in the original bill filed objections before the master which were overruled. The objections were ordered to stand as exceptions

before the court, and on a trial were again overruled and a decree entered dismissing the original bill for want of equity, and finding that the amount due J. S. Ward on the notes secured by the mortgages so much exceeds the value of the mortgaged property that no benefit can inure to defendant or any creditor from a sale of the premises, and that Ora Ward and Bernice Ward within five days convey the premises to J. S. Ward in full satisfaction of said mortgage indebtedness, and that upon H. L. Barnes paying to J. S. Ward said \$8,603.99, with legal interest from the date of the decree together with the costs, within six months from the date of this decree, that J. S. Ward convey said premises to H. L. Barnes, and that H. L. Barnes pay the costs of this suit. H. L. Barnes has sued out a writ of error to review the decree.

A. M. HESTER, for plaintiff in error; WELTY, STERLING & WHITMORE, of counsel.

DEMANGE, GILLESPIE & DEMANGE, for defendants in error.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

It is contended that the court erred in dismissing the original bill for want of equity. It is not controverted but that the two first mortgages, one for \$2,000 to Sophia Lingg, assigned to J. S. Ward, and the other to J. S. Ward for \$2,500, are bona fide and were given, one for part of the purchase money, and the other to obtain money with which to make the cash payment at the time the mortgagors purchased the real estate covered by these mortgages. The evidence shows conclusively that on October 23, 1911, when the note for \$4,000 and the mortgage securing it were executed, Ora Ward was indebted to J. S. Ward in the further sum of \$4,000—\$2,000 of which was for a liability on

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a note, which J. S. Ward, as surety for Ora Ward, had executed to plaintiff in error, on the promise of Ora Ward to secure him by a mortgage on the premises. "The right of a debtor to pay one creditor in preference to another, or to turn out property in satisfaction of or to create a lien upon it for the security of a particular debt, in preference to and to the exclusion of other liabilities, always existed at common law." *Farwell v. Nilsson*, 133 Ill. 45; *Merchants' Nat. Bank v. Lyon*, 185 Ill. 343; *Murry Nelson & Co. v. Leiter*, 190 Ill. 414. There was no error in dismissing the original bill for want of equity since there was a full consideration for the third mortgage, and Ora Ward had the right in good faith to secure his father to the exclusion of the plaintiff in error. Whatever may be said of the justice or equity of this rule, its existence is too firmly established to be questioned. *Morriss v. Blackman*, 179 Ill. 103.

It is contended that the note and mortgage were not delivered before the judgments were rendered. J. S. Ward was seventy-five years of age, with poor eyesight and forgetful, and for some time prior to the execution of the note and mortgage had been insisting that he be secured. He was not present when the note and mortgage were executed, but had been informed by the mortgagors that they were going to Bloomington to execute them, and they were prepared and executed at his request. Ora Ward testified that his father was uneasy and that on October 22nd he told his father that he would go and give him a mortgage and his father said, all right go to Lester Martin, an attorney, and have him attend to it and that he, J. S. Ward, would pay the expense; that Martin prepared the papers and sent Ora Ward to have the mortgage recorded; that Ora Ward did record the mortgage and directed it to be mailed to his father at Colfax, when recorded, and got the recorder's receipt and the note, and they were delivered to J. S.

Ward by Bernice Ward the evening of October 23rd. Bernice Ward testified to the same effect. The proof shows a delivery of the mortgage to the recorder for the mortgagee and the delivery of the recorder's receipt and the note to the mortgagee the same day; these facts constituted a delivery of the note and mortgage to the mortgagee and an acceptance of them by him.

It is also contended that the court erred in decreeing a strict foreclosure. The decree is an unusual one, in not giving Ora Ward and Bernice Ward any time in which to redeem the premises, and in commanding them "to convey by warranty deed within five days from the rendition of this decree the said premises to J. S. Ward in full satisfaction of the said indebtedness secured by said mortgages," but they have neither assigned any error nor are they making any complaint about the decree.

The decree gives H. L. Barnes, the judgment creditor, six months from the entering of the decree within which to pay to J. S. Ward the sum of \$8,603.99 with legal interest and the costs, and directs that upon the making of such payment J. S. Ward convey said premises to H. L. Barnes by a proper conveyance free from the liens of said mortgages or any incumbrances arising out of any act of said J. S. Ward.

The original bill, which is verified by plaintiff in error, alleges that by the execution of the third mortgage Ora and Bernice Ward by such act did then and there part with the full value of their equity to a relative. The cross-bill alleges that the mortgaged premises are meager and scant security for the sum of \$8,253.10, the amount due at the time the bill was filed, and wholly insufficient to pay the same.

Ora and Bernice Ward in their answer to the cross-bill agree that J. S. Ward may take the mortgaged premises in discharge of the amount due him, freed from homestead and every interest of said defendants

in the premises, and it is admitted by all parties that the mortgagors are and were insolvent on October 23, 1911.

The plaintiff in error in his answer to the cross-bill admits that the mortgaged premises are meager and scant security for a bona fide indebtedness of \$8,253.10, as set forth by cross complainant, but says said premises are ample security for the indebtedness really owing by Ora Ward, secured by mortgage.

The evidence shows that the property is worth from \$7,000 to \$7,500, no witness puts it over \$7,500 and Roy Barnes, who is a banker and the son of plaintiff in error, and who made the loans for plaintiff in error, testified that Ora Ward tried to sell it to him for \$8,500 in payment of his indebtedness before the \$4,000 mortgage was given, but that he was asking too much. The master found the mortgaged premises to be worth \$7,500, and there is no exception to that finding. It is clear that the value of the property was less than the mortgage incumbrance against it.

While it is a general rule that strict foreclosures are not favored in equity where there are other creditors, yet the rule is not an arbitrary one and there are exceptions to it. A strict foreclosure may be allowed where there are other creditors and the property is of less value than the debt, the mortgagor is insolvent and the mortgagee is willing to take the property in discharge of his debt. *Illinois Starch Co. v. Ottawa Hydraulic Co.*, 125 Ill. 237. The object of giving time for redemption is to make the property pay as much of the debts of the mortgagor as the property is worth. It was said in the case last cited: "The court of equity will not, by a decree of strict foreclosure, sacrifice the just and equitable rights of creditors, or of those holding second liens, or the equity of redemption. Neither will the court of conscience sacrifice or endanger the rights of a complainant who comes within her portals with a just cause, and hold-

ing the oldest and preferred lien and best equity, for the bare possibility of a wholly improbable benefit to one having a second lien and subordinate equity." *Moffett v. Farwell*, 123 Ill. App. 528; affirmed in 222 Ill. 543.

The evidence concerning the value of the property and the admission of plaintiff in error that it was worth less than the amount of the mortgages against it show that the plaintiff in error was not harmed by the strict foreclosure. To have foreclosed the mortgages in the ordinary method would have made a large bill of unnecessary and useless costs. The mortgagors consented to a strict foreclosure and the mortgagee agreed to accept the property in satisfaction of his debt. Plaintiff in error might redeem the same and get the title of the Wards with immediate possession, disincumbered of the homestead of the Wards, without permitting the mortgage debt to be increased by the accumulation of interest and the costs of the mortgage sale. The court gave plaintiff in error six months to redeem from the decree. There was no error against plaintiff in error in the granting of a strict foreclosure.

The court taxed all the costs of the case against plaintiff in error. The mortgagee to secure a strict foreclosure agreed to accept the property in satisfaction of the mortgage debt and costs of the foreclosure. There was no reason why the costs that appertain to the foreclosure should have been taxed against plaintiff in error. The plaintiff in error was properly taxable with all costs caused by the filing of the original bill, and the trial of the issue made thereon. The court erred in taxing all the costs properly arising out of the cross-bill and the issue thereon to plaintiff in error. If there were costs made in said matter by the defense of plaintiff in error against the strict foreclosure that otherwise would not have been made, such costs were taxable to plaintiff in error in the discretion of the court. The decree is affirmed in all particulars ex-

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cept as to the taxation of costs; that part of the decree taxing the costs against the plaintiff in error is reversed and the cause remanded with instructions to apportion the costs and give plaintiff in error ninety days after the entering of the decree in which to redeem if he shall so desire. The costs of this writ of error will be taxed one-half to J. S. Ward and one-half to plaintiff in error.

Affirmed in part, reversed in part and remanded with directions.

John French, Appellee, v. The Cloverleaf Coal Mining Company, Appellant.

1. APPEAL AND ERROR, § 198*—*when question of validity of statute waived.* A party appealing to the Appellate Court waives the question as to the constitutionality of a statute.

2. MASTER AND SERVANT, § 760*—*when question of proximate cause for jury.* In an action for injuries sustained by a shot firer in a coal mine, the question of whether the negligence of the defendant was the proximate cause of the injuries was for the jury; and it appearing that loaded coal cars and gob piled at both sides of the cars delayed the plaintiff from escaping from a shot, a finding of negligence was sustained.

3. MASTER AND SERVANT, § 528a*—*what is effect of Compensation Act.* In an action by a servant for injuries sustained in a mine, where it appeared that the defendant had elected not to pay compensation under the Workmen's Compensation Act, (J. & A. ¶¶ 5449 et seq.), the effect of such election was to relegate the plaintiff to a suit at law for damages measured by the law as it existed prior to the act, except that contributory negligence could not be considered in reduction of damages.

4. MASTER AND SERVANT, § 670*—*what evidence admissible to show damages.* In an action by a shot firer for injuries sustained in a coal mine, there was no error in permitting the plaintiff to prove the amount of his daily wages.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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5. MASTER AND SERVANT, § 795*—*when requested instruction may be refused.* In an action for injuries sustained by a shot firer in a coal mine, there was no error in refusing requested instructions when the instructions given covered those refused.

6. DAMAGES, § 135*—*when verdict not excessive.* Where a shot firer in a coal mine, forty-four years of age, earning \$4.72 a day, had both his upper and lower jaws broken, lost several teeth and pieces of bone, was out of work nine weeks, was in bed two weeks, suffered intense pain and was compelled to pay a doctor's bill of \$75, a verdict of \$1,029.16 was not excessive.

Appeal from the Circuit Court of Montgomery county; the Hon. THOMAS M. JETT, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914.

MILLER & McDAVID, for appellant.

HILL & BULLINGTON, for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

This is an action on the case begun by appellee against appellant to the January term, 1913, of the Montgomery County Circuit Court to recover damages for personal injuries suffered by appellee while working as a short firer in appellant's coal mine. The declaration contains two counts, both averring common-law negligence. Each count avers that the appellant was operating a coal mine in Montgomery county; that appellee was employed therein as a short firer; that the appellant had elected not to accept the provisions of the Compensation Act in force May 1, 1912, and was thereby deprived of the defenses of assumed risk; that the injury was caused in whole or in part by the negligence of a fellow-servant, and proximately caused by the contributory negligence of appellee, except that such contributory negligence shall be considered in reducing the amount of damages; that appellee had, as an employee of appellant, elected to accept the provisions of said act; that in the under-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.
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ground works of said mine were divers roadways, crosscuts and rooms; that on September 16, 1912, appellee was engaged in rooms 3, 4, 5, 6 and 7 off a certain entry, and while engaged as a shot firer, after placing a shot in room seven, appellee started to room number 4 where he encountered an obstruction of three cars which appellant had negligently placed there, with gob on either side which appellant had negligently placed, wholly obstructing the travel of appellee, and while so delayed a shot exploded and thereby appellee was injured.

The second count contains the further averment that after appellee had ignited certain shots and started to retire to a place of safety he encountered an obstruction, consisting of cars with gob on either side thereof, negligently placed and permitted to remain whereby appellee was delayed.

A demurrer to both counts of the declaration was overruled. The appellant then filed a plea of not guilty. On a trial before a jury a verdict for \$1,029.16 was returned in favor of appellee, on which judgment was rendered.

It is insisted that the court erred in overruling the demurrer for the reason the Compensation Act is unconstitutional. The Supreme Court has held the act constitutional. *Deibeikis v. Link-Belt Co.*, 261 Ill. 454; 5 N. C. C. A. 401; *Dietz v. Big Muddy Coal & Iron Co.*, 263 Ill. 480, 5 N. C. C. A. 419, and if the act had not been passed on, the appellant by appealing to this court has waived that question. *Luken v. Lake Shore & M. S. Ry. Co.*, 248 Ill. 377, 4 N. C. C. A. n492.

It is also contended that the evidence does not sustain the finding in favor of appellee for the reason that the evidence does not show the negligence of the appellant was the proximate cause of the injury. The evidence shows that there were loaded coal cars standing in the neck of rooms 6 and 7 and that there was gob piled at both sides of the cars in the neck of room 6 which was eighteen inches high at the wheels and

French v. The Cloverleaf Coal Mining Co., 190 Ill. App. 400.

sloped back to the rib, where it was four feet high, and that this obstruction would delay a person trying to get out of the room in a hurry. Appellee had lighted the fuse to the shots and had then run to the mouth of the room where, having to crawl over the gob to get out, he was delayed until the shot exploded and a piece of the rock struck him on the right side of his face. If the cars had not obstructed the neck of the room, or the gob had not hindered him so that he had to crawl over it, he would have been out of the neck of the room before the explosion occurred. We think it was a question for the jury whether the negligence of the defendant was or not the proximate cause of the injury. The evidence sustains the finding in favor of appellee.

It is also argued that appellee can only recover the compensation that is provided for by the act. The appellant elected not to pay compensation under the act. The effect of that election by appellant is to relegate appellee to a suit at law for his damages measured by the law as if it existed prior to the act, except that contributory negligence, if any of appellee, shall be considered in reduction of his damages. There was no error in permitting appellee to prove the amount of his daily wages.

It is contended that the court erred in refusing the second refused instruction requested by appellant. The first part of the instruction was fully given in both appellant's second and third given instructions, and the remainder of the refused instruction which tells the jury "that the plaintiff must prove by a preponderance of the evidence that the said negligent act was the direct and proximate cause of the injury," is fully given in appellant's thirteenth, which tells the jury that "the damages to be recovered in an action must always be the natural and proximate consequences of the wrongful act complained of * * * that to entitle the plaintiff to recover in this case the damages

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claimed must be the direct consequence of the act complained of. The relation of cause and effect must be shown to exist between the act complained of and the injury." There is no error either in giving or refusing instructions.

It is also insisted that the judgment is excessive. The evidence shows that appellee is forty-four years of age, that he was earning \$4.72 a day, that both his upper and lower jaws were broken, four teeth were knocked out and seven pieces of bone extracted, he was out of work nine weeks, confined to his bed two weeks, suffered intense pain and had a doctor's bill of about \$75. We cannot say that the judgment is excessive or that it should be set aside because the damages were calculated down to cents. The judgment is affirmed.

Affirmed.

First National Bank of Leroy, Plaintiff in Error, v. Harry J. Stewart et al., Defendants in Error.

1. **FRAUDULENT CONVEYANCES, § 109***—*when debtor may give preference.* A debtor who is insolvent or in failing circumstances may prefer any creditor, although the preferred creditor may be a relative.

2. **FRAUDULENT CONVEYANCES, § 268***—*when evidence fails to show fraudulent conveyance.* Evidence held to show that transfers of the property by a debtor were made in good faith and for full value in the payment of just debts, and such transactions were not colorable for the purpose of hindering and delaying creditors.

Error to the Circuit Court of McLean county; the Hon. COLSTIN D. MYERS, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914. Rehearing denied November 6, 1914.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

LESLIE J. OWEN and STONE, OGLEVEE & FRANKLIN,
for plaintiff in error.

LIVINGSTON & BACH, for defendants in error.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

The First National Bank of Leroy on February 14, 1913, filed a creditor's bill against Harry J. Stewart, William Raber and Ed. Raber, alleging that on February 13, 1913, the complainant recovered a judgment for \$1,522.24 and for costs against Harry J. Stewart and Anna Stewart; that an execution had been issued on said judgment and returned no property found; that the principal defendant, Harry J. Stewart, has money on hand, promissory notes or other securities due him, and personal property which he keeps concealed, and which complainant has been unable to reach by execution; that the principal defendant has since November 1, 1912, conveyed personal property to William Raber and Ed. Raber without any good and sufficient consideration and with the intent to hinder and delay complainant in the collection of its debt.

The defendants answered the bill denying its allegations wherein fraud is alleged. The cause was referred to the master in chancery to report the evidence with his conclusions. A report was made that there was no fraudulent intent in the transactions between the defendants and the evidence showed nothing more than a preference for the payment of debts due to the Rabers. On a hearing on exceptions before the court a decree was entered dismissing the bill for want of equity. The complainant has sued out a writ of error to review that decree.

The evidence shows that Harry Stewart and William Raber are farmers, Stewart being a tenant farmer, and that Raber had furnished Stewart with funds with which to start farming; that in December, 1912, Stew-

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art, in order to reduce his indebtedness to plaintiff in error, held a public sale and that substantially all the proceeds thereof, amounting to about \$2,000, were paid to plaintiff in error. Shortly after the sale a note made by Stewart for \$700 to the Keenan bank, and the rent for the farm he occupied, became due. He was also indebted to Raber on four notes, amounting to \$946, against which he was entitled to a credit from Raber for \$106 for some stock bought by Raber at the public sale. Stewart, while so indebted to Raber, asked him for the loan of \$1,000 with which to pay his rent and the Keenan note. Raber declined to loan him any more money. Stewart insisted that he must have the money, and on January 2, 1913, agreed to sell Raber enough property to get the \$1,000 he needed at the time. They went over the balance of the property he then had, item by item, and Stewart sold to Raber property to the value of \$1,000 and Raber delivered to Stewart two checks, one for \$725 and one for \$275, with which to pay the note at the Keenan bank and his cash rent, and a part of the property sold to Raber was turned over to him. Shortly thereafter Stewart again went to Raber for more money; they talked over Stewart's financial condition and went to Bloomington where Stewart made a bill of sale of his property to Raber in payment of the notes due to Raber from Stewart, and Raber gave Stewart a check for \$275, the value of the property over the amount of the notes. The value of all the property turned over by Stewart to Raber, including that sold to him when the checks dated January 2, 1913, were given to Stewart, was \$2,036. The summary of the transactions showed that Raber received property valued at \$2,036, and that the money paid to Stewart with the notes held by Raber against Stewart and cancelled at the making of the bill of sale amounted to over \$2,100. Raber paid full value for everything he received. There is no evidence of any fraud in the transaction, and it occurred

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before the Bulk Sales Act took effect. Stewart was endeavoring to pay Raber, who had befriended him, and received full value for the property sold to Raber. The evidence does not sustain the allegations of the bill that the transfers were either without adequate consideration, colorable or made for the purpose of hindering and delaying creditors, but does sustain the contention of defendants in error that they were made in good faith and for full value in the payment of just debts. Such transfers are not invalid. A debtor who is insolvent or in failing circumstances may prefer any creditor, although the preferred creditor may be a relative. *Merchants' Nat. Bank v. Lyon*, 185 Ill. 343; *Murry Nelson & Co. v. Leiter*, 190 Ill. 414. Whatever may be said of the justice or equity of the rule, its existence is too firmly established to be questioned. *Morriss v. Blackman*, 179 Ill. 103.

The point is made by defendants in error that the plaintiff in error has not exhausted his remedy at law and cannot maintain this suit, for the reason that the return on the execution shows that it was ordered returned, no property found, by the attorney or plaintiff in error. Since the decree is right on the merits, it is not necessary to discuss the legal question.

The decree is affirmed.

Affirmed.

John S. Crain, Appellee, v. James F. Burnett, Appellant.

1. LANDLORD AND TENANT, § 5*—*when relation not created*. Under a contract by which a person was to furnish her son-in-law with board and lodging and pay him \$50 per year, in return for which the son-in-law was to render certain services, furnish household sup-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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plies and care for his mother-in-law, the premises occupied being restrained by the mother-in-law during her life, the son-in-law had no right of possession to the premises except as was necessary to perform the services required, and the contract did not create the relation of landlord and tenant, but that of master and servant.

2. MASTER AND SERVANT, § 39*—*what is duty of employee on termination of relation.* Where an employee occupies a house incidently to his employment and he is discharged, whether the discharge be rightful or wrongful, he must vacate the premises occupied by him as such employee, and if he fails to leave peaceably, or after doing so returns and becomes a trespasser, he may be ejected by the master although his wages have not been paid.

3. FORCIBLE ENTRY AND DETAINER, § 3*—*when remedy available.* Under the Forcible Entry and Detainer Act, § 2, (J. & A. ¶ 5843), suit may be maintained when a peaceable entry is made and the possession unlawfully withheld; and where a contract for services under which a son-in-law occupied premises of his mother-in-law was cancelled wrongfully, it was his duty to vacate the premises, and his withholding possession thereafter was wrongful.

4. APPEAL AND ERROR, § 1625*—*when exclusion of evidence harmless.* In a suit in forcible detainer, a contract showing the nature of the occupancy of the premises was competent, but its rejection as evidence was harmless, where such contract was in the record and its admission could not have changed the result of the trial.

Appeal from the County Court of Piatt county; the Hon. FRED C. HILL, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914.

HICKS & Doss, for appellant.

A. C. EDIE and F. M. SHONKWILER, for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

This is a suit in forcible detainer begun by John S. Crain, appellee, against James F. Burnett, appellant, before a justice of the peace and appealed to the County Court of Piatt county. In the trial in the County Court a jury was waived, and the court found the appellant guilty of unlawfully withholding the pos-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

session of the premises described in the complaint, and judgment was rendered in favor of appellee.

Appellant married a daughter of S. V. and Sarah Hamilton. After the marriage appellant and his wife made their home with her parents, and about fourteen years ago the Hamiltons with appellant moved into the premises in controversy.

S. V. Hamilton died in 1903. In January, 1904, Mrs. Hamilton and appellant executed the following written agreement under their seals:

“This agreement made and entered into this twelfth day of January (1903) by and between Sarah E. Hamilton party of the first part and J. F. Burnett party of the second part witnesseth:

“That the party of the first part in consideration of the promises hereinafter expressed agrees to furnish party of the second part with board, lodging and washing and fifty dollars (\$50.00) per year to be paid on January 1st of each year. Also household and kitchen furniture. Party of the first part further agrees to execute a warranty deed to the S. $\frac{1}{2}$ South Half lots three, four, five and six (3, 4, 5 and 6) Block No. 3 in Randall's Addition to the village of Atwood, Piatt County, Illinois. Party of the first part reserving a life estate with all the rights of possession and control during her lifetime.

“And in consideration of the performance of the above by the first party said second party agrees to furnish all vegetables such as potatoes, cabbage, turnips, all kind of fruit and berries. Also to furnish a first-class garden all for family use, also to furnish poultry and eggs, to keep lawn and shrubbery, shade trees, fruit trees and flowers in first-class condition. Also to see that fuel is provided, fires kept up, also to attend to all business affairs when requested to by party of the first part. Party of the second part reserving the right to work at his trade or any other labor, provided in so doing it does not interfere with work at home.

“Party of the second part further agrees to care for party of the first part through health, sickness and

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death, in the event of death to see that she is laid to rest by the side of her husband in McVile Cemetery."

The deed from Mrs. Hamilton to appellant was made November 23, 1909. It contains the clause, "the grantor reserving a life estate with all the rights of possession and control during her lifetime."

In August, 1910, Edward R. Parsons was, by the County Court of Piatt county, appointed conservator of the person and estate of Mrs. Hamilton, who had been found to be distracted. On August 29, 1910, the conservator made a contract with appellee under which appellee was to move into said premises with Mrs. Hamilton, occupy the premises and care for her, furnishing her food, clothing, care and maintenance except nursing during illness, for which appellee was to have the use of the premises and \$41.65 per month. This contract was approved by the County Court. On August 30th the appellee, as lessee, made a demand in writing on appellant for the immediate possession of the premises, and on the same day the conservator, on behalf of Mrs. Hamilton, made a demand in writing on appellant that he deliver up the possession of the premises within thirty days. The appellant continuing to live on the premises, thereafter, on October 1st, this suit was begun. The evidence of appellant was that he had made his home with Mrs. Hamilton for forty-two years and that there was an error in the date of his contract with her, that it was made in 1904.

The appellant contends that his possession was not such as is contemplated by the statute in order for the plaintiff to maintain this action, while the appellee contends that the occupation of appellant was a tenancy at will.

The contract is one by which Mrs. Hamilton was to furnish appellant with board and lodging, but not for any specified time, and pay him \$50 per year, in return for which the appellant was to render certain specified services, furnish certain household supplies and care for Mrs. Hamilton. Mrs. Hamilton reserved all

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rights of possession and control of the premises during her life. The contract does not give appellant any right to the possession or any control over the premises during her life. The relation between them was one of master and servant or employer and employee. The only right of occupancy or possession that appellant had under the contract was such as was necessary for or incident to the performance of the services to be rendered by him. Such right to occupy or possess did not create the relation of landlord and tenant. *Cochrane v. Tuttle*, 75 Ill. 361; *Haywood v. Miller*, 3 Hill (N. Y.) 90; *Wilson v. Martin*, 1 Denio (N. Y.) 602; *White v. Maynard*, 111 Mass. 250; 18 Am. & Eng. Encyc. of Law, 171; 24 Cyc. 879.

There is no evidence in the record as to the performance or nonperformance by appellant of the duties agreed to be performed by him. So far as this record is concerned it must be conceded that appellee has not shown any right to cancel the contract and discharge appellant. If it be conceded that appellant was not in default, then appellee had no cause to cancel the contract, and the demand for possession of the premises was a discharge of appellant and a termination of the contract for service, but not for cause on the part of appellant.

Where an employee occupies a house incidentally to his employment and he is discharged, whether the discharge be rightful or wrongful, he must vacate the premises occupied by him as such employee. If he fails to leave peaceably, or after doing so returns, he becomes a trespasser and may be ejected by the master although his wages have not been paid. 26 Cyc. 996; *Champion v. Hartshorne*, 9 Conn. 564; *Kerrains v. People*, 60 N. Y. 221; *Bourland v. McKnight*, (79 Ark. 427), 4 L. R. A. (N. S.) 698; *Noonan v. Luther*, (206 N. Y. 105), 41 L. R. A. (N. S.) 761, and notes.

The second section of the Forcible Entry and Detainer Act (J. & A. ¶ 5843) provides that the suit may

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be maintained, when a peaceable entry is made and the possession unlawfully withheld. When the contract under which appellant occupied the premises as a lodger was cancelled, although wrongfully, still it was his duty to vacate the premises, and his withholding possession thereafter was wrongful.

The court sustained an objection to the introduction in evidence of the contract between Mrs. Hamilton and appellant. The contract was clearly competent for the reason it showed the nature of the occupancy of the premises by appellant. However, as the contract is in the record and its admission could not have changed the result of the trial, its rejection was harmless error. There being no reversible error in the record, the judgment is affirmed.

Affirmed.

Cyrus O. Fletcher et al., Executors, Appellees, v. Chicago & Alton Railroad Company, Appellant.

1. RAILROADS, § 461*—*when railroad liable for excessive speed.* Under the statute chapter 114, § 87, (J. & A. ¶ 8836), when any railroad corporation shall run any train at a greater rate of speed than is provided by ordinance it shall be liable for all damages done to person or property by such train, "and the same shall be presumed to have been done by the negligence of said corporation."

2. RAILROADS, § 551*—*what does not preclude finding of due care.* In an action for the death of a person who was struck by a train, the facts that the day was clear, and that the deceased was familiar with the crossing and might have seen the train if he had looked just before he was struck, would not preclude the jury from finding that the deceased was in the exercise of ordinary care.

3. RAILROADS, § 738*—*when evidence sufficient to show due care.* In an action for the death of a person who was killed by a train at a crossing, operated at a speed in violation of an ordinance, the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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evidence was sufficient to sustain a finding of due care on the part of the deceased and that the speed of the train was the proximate cause of the accident.

Appeal from the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914. *Certiorari* denied by Supreme Court (making opinion final).

PATTON & PATTON, for appellant; SILAS H. STRAWN, of counsel.

THOMAS L. JARBETT and GRAHAM & GRAHAM, for appellees.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

The executors of the estate of Benjamin Fletcher, deceased, brought this suit in case against the Chicago & Alton Railroad Company, charging the railroad company with negligence in the running and management of a train by means whereof Benjamin Fletcher, while attempting on a public street in the village of Chatham to drive across the track of the defendant, was struck by a train and killed and his automobile, of the value of \$2,000, entirely destroyed. There was a verdict and judgment for \$3,000 in favor of plaintiff and the defendant appeals.

The declaration charges the appellant with negligence in violating an ordinance of the village limiting the speed of freight trains to six miles an hour, with a failure to give the statutory signals at highway crossings, and with a failure to manage its trains with due regard to the safety of others at a highway crossing.

The village of Chatham is laid out in lots and blocks. Main street runs north and south and is crossed at right angles by Spruce street in the southern part of the village. Appellant's railroad runs slightly east of north and west of south, crossing Main street at the intersection of Spruce street at an acute angle of

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twenty-two degrees. The railroad is a double-track road, the west track being the southbound track. The track of the Illinois Traction Company, an interurban railway, is on the west side of the railroad and substantially parallel with it. The depot is on the west side of the railroad a block east of Main street and two and a half blocks northeasterly from the intersection of the railroad and Main street. The railroad section house and the tool house stand on the west side of the railroad about half way between the depot and the Main street crossing. The railroad tracks are slightly above the level of the land. There are no obstructions to the view between Main street and the railroad south of the depot except the section house, the tool house and a few trees in the vicinity of the section house.

The evidence shows that the deceased, a retired farmer seventy-three years of age, on November 29, 1912, alone in a new 36-horsepower Chalmers automobile left Springfield to go to a farm south of Chatham. While going south on Main street through Chatham his automobile was struck by a freight train going south on the west track of appellant, when crossing the railroad at the Main street crossing, and he was killed and the machine was destroyed. The train was about three hundred and fifty feet long. It consisted of eight tank cars, a caboose and a locomotive with its tender, and was backing up from Knapp to Virden with the caboose in front and the locomotive, with the tender behind, pushing the cars ahead of it.

There was in force, at the time the deceased was killed, an ordinance of the village limiting the speed of freight trains to not exceeding six miles an hour.

The evidence is conflicting as to whether any bell was rung or whistle sounded. The evidence as to the speed of the train is also conflicting. Three of the train crew testify that the speed of the train was ten miles an hour; another witness testifies it was

twenty miles an hour; five witnesses testify it was twenty-five miles an hour and two testify the speed was thirty miles an hour. The train ran five hundred feet after striking the automobile, pushing the automobile ahead of it, and was stopped with the automobile under the caboose. The evidence is that the automobile was going slowly, about five miles an hour. The train crew saw the deceased—the conductor and the brakeman from the caboose, and the engineer from the locomotive—from the time they passed the depot. They also testify that an air whistle was blowing from the time they passed the depot and that they thought the driver of the automobile would come up close to the track and stop, but when they saw he was not going to stop they shouted to him and applied the air brakes about two car lengths from the crossing; that the deceased did not appear to hear them and they say he never turned his head or looked back over his shoulder towards the direction the train was coming from after they saw him.

It is clearly proven that the train was run at a speed much beyond the rate permitted by the ordinance. The train was backing up and going substantially in the same direction the deceased was traveling in the automobile. The deceased may have seen the train and thought it was going in the other direction. If the train had not been going at a speed greater than that permitted by the ordinance he would not have been struck by the caboose. The statute provides (section 87, ch. 114, J. & A. ¶ 8836) that when any railroad corporation shall run any train at a greater rate of speed than is permitted by ordinance it shall be liable for all damages done to person or property by such train, "and the same shall be presumed to have been done by the negligence of said corporation." This statute has been applied and enforced in numerous cases. *Chicago & E. I. R. Co. v.*

Pollonos v. Renner, 190 Ill. App. 416.

Croze, 214 Ill. 602; *Winn v. Cleveland C., C. & St. L. Ry. Co.*, 239 Ill. 132.

It is argued that it is not proved by the evidence that the deceased was in the exercise of due care. The facts that it was a clear day, and that the deceased was familiar with the crossing and might have seen the train if he had looked just before he was struck, do not preclude the jury from finding from the evidence that the deceased was in the exercise of ordinary care. He may have looked after he passed the section house or seen the train and not have noticed that it was backing up, but thought it was going north in the direction a train put together as that was would naturally be going. We are not able to say that the jury were not justified in finding from all the evidence that the deceased was in the exercise of due care or that the speed of the train was not the efficient cause of the accident. No other question is presented for review. Neither is any question raised concerning the right to recover damages for the destruction of the automobile and the death of deceased for the benefit of the next of kin in the same suit. The judgment is therefore affirmed.

Affirmed.

Mike Polionos by Peter Polionos, Appellee, v. Fred A. Renner, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Macoupin county; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914. Rehearing denied December 2, 1914.

Pollonos v. Renner, 190 Ill. App. 416.

Statement of the Case.

Action on the case by Mike Polionos, by his next friend, Peter Polionos against Fred A. Renner, a surgeon, to recover for damages alleged to have been sustained in consequence of the unskilled and negligent manner in which he treated a fracture of the bone in the right leg. A jury returned a verdict in favor of the plaintiff for two hundred dollars, on which judgment was rendered and the defendant appealed.

CLARENCE E. POPE, EDWARD C. KNOTTS and PEEBLES & PEEBLES, for appellant; ROBERT J. FOLONIE, of counsel.

RINAKER & RINAKER, for appellee.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

Abstract of the Decision.

1. PHYSICIANS AND SURGEONS, § 22*—*when evidence shows unskilful treatment.* Where a fourteen-year-old boy was injured by an iron radiator falling on his leg, and the greater weight of evidence was that a reliable diagnosis of the injury could not be made without an X-ray picture, and that a surgeon made an erroneous diagnosis by mere manipulation, and gave the limb such treatment that a surgical operation was thereafter necessary, a verdict against such surgeon was not against the manifest weight of the evidence.

2. PHYSICIANS AND SURGEONS, § 21*—*what evidence admissible in action for negligent treatment.* In an action against a surgeon for damages occasioned by unskilful treatment of an injured boy, evidence of what the plaintiff's father said and did when he learned of the accident to his boy was properly excluded.

3. TRIAL. § 274*—*when irregularity in verdict immaterial.* Where a jury after agreeing on a verdict used a form given them by the court and simply wrote in such form for defendant the words, "two hundred dollars," and signed their names and were then discharged, the verdict being received in court on the following Monday, the intention of the jury to render a verdict for the plaintiff was obvious, and the irregularity would not warrant a reversal of the judgment thereon.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

White v. Libro, 190 Ill. App. 418.

Bliss C. White, Appellee, v. Charles Libro, Appellant.

(Not to be reported in full.)

Appeal from the County Court of Macoupin county; the Hon. TRUMAN A. SNELL, Judge, presiding. Heard in this court at the April term, 1914. Reversed. Opinion filed October 16, 1914.

Statement of the Case.

Suit to recover rent by Bliss C. White against Charles Libro. An appeal was taken from the judgment of a justice of the peace to the County Court where the case was tried by the court without a jury. The evidence showed that James E. Colvin executed a bond for a deed whereby he agreed to convey real estate to Ercole Libro, a brother of the defendant, provided that he paid a mortgage of \$900 to an improvement association in monthly payments of \$11.64, and a further sum of \$535 to Colvin, to be paid \$100 in cash and the balance in monthly payments of \$2.61 per month with interest at six per cent. per annum, payable monthly, and all taxes. Ercole Libro was furnished with a pass book and nine shares of stock in the association, such pass book showed sixty-two payments in accordance with the contract, payments being made down to within thirty days of the bringing of this suit. It appeared, however, that Ercole Libro went to Europe after putting his brother in possession of the premises, and that payments were thereafter made by Charles Libro, and entered in the pass book of Ercole Libro.

At the conclusion of the trial, judgment was rendered in favor of plaintiff for \$128.25, and the defendant appealed.

PEEBLES & PEEBLES, for appellant.

ALFRED A. ISAACS, for appellee.

Burke v. Toledo, Peoria & Western Ry. Co., 190 Ill. App. 419.

MR. PRESIDING JUSTICE THOMPSON delivered the opinion of the court.

Abstract of the Decision.

LANDLORD AND TENANT, § 487*—*when suit for rent will not lie.* Under the Landlord and Tenant Act, § 1, par. 3, (J. & A. ¶ 7039), providing that rent may be recovered when possession has been obtained under an agreement for the purchase of premises and before deed is given, where the right to possession is terminated by forfeiture or noncompliance with the agreement, and possession is wrongfully refused to be given upon demand in writing by the party entitled thereto, such action for rent will not lie where there is no proof of a demand for possession made in writing.

Elizabeth Burke, Administratrix, Appellee, v. Toledo, Peoria & Western Railway Company, Appellant.

1. MASTER AND SERVANT, § 298*—*when station agent and brake man not fellow-servants.* A station agent and a brakeman on a freight train are not fellow-servants.

2. MASTER AND SERVANT, § 350*—*when risk of another servant's negligence not assumed.* The negligence of a station agent in placing baggage and express on the station platform in such close proximity to the tracks as to strike a brakeman riding on the step or stirrup of a box car, while engaged in his duties in connection with switching cars, is not a risk assumed by such brakeman.

3. MASTER AND SERVANT, § 753*—*when contributory negligence a question for jury.* In an action to recover for the death of a brakeman caused by his being struck by baggage and express trucks standing on the station platform while he was riding on the stirrup or step of a passing box car engaged in his duties in connection with switching cars, where there is no evidence tending to show that deceased had any knowledge that the trucks were on the platform, or that they were too close to permit him to pass, the question of his contributory negligence is for the jury.

4. MASTER AND SERVANT, § 485*—*how rule of railroad to be construed.* Where a railroad company's rule provides that "an inferior train must keep at least five minutes off the time of a superior

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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train in the same direction, and must be clear at the time the superior train is due to leave the last station in the rear where time is shown," the word "time" cannot be construed as meaning the schedule time named in the time cards for the arrival and departure of trains, but as referring to the actual time when the trains arrive and depart.

5. MASTER AND SERVANT, § 757*—*when contributory negligence a question for jury.* In an action to recover for the death of a railroad brakeman while employed by defendant railroad company, where defendant contends that deceased was guilty of contributory negligence as a matter of law in violating its rule requiring the tracks to be cleared for trains having the right of way, the burden of showing the violation is on defendant, and where the evidence in regard to the violation is conflicting, the question is one for the jury under proper instructions.

6. MASTER AND SERVANT, § 805*—*when instruction defining assumption of risk not erroneous.* In an action to recover for the death of a brakeman killed by being struck by a truck near the track while in the performance of his duties in the employ of defendant Railroad Company, it is not error to instruct that the servant does not assume "risks of the master's own negligence," in an instruction defining the risks which a servant assumes, where there is no evidence that deceased knew that the truck had been placed on the platform, nor that it had been placed so near the track as to menace his safety, and where it cannot be said as a matter of law that he had equal opportunity with the master of knowing its position, but his knowledge and of the danger therefrom are denied in the declaration and the jury are instructed to find defendant not guilty if they believe from the evidence that the truck was in plain view and could have been seen by deceased in the exercise of ordinary care and caution, or if he had an equal opportunity with defendant of ascertaining the location of the truck.

Appeal from the Circuit Court of Tazewell county; the Hon. THEODORE N. GREEN, Judge, presiding. Heard in this court at the April term, 1913. Affirmed. Opinion filed October 16, 1914. Rehearing denied November 6, 1914. *Certiorari* allowed by Supreme Court.

STEVENS, MILLER & ELLIOTT and GEORGE C. RIDER,
for appellant.

JESSE BLACK, JR., for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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MR. JUSTICE ELDREDGE delivered the opinion of the court.

Appellee recovered a judgment against appellant for seventy-five hundred dollars in an action on the case for damages for the death of her intestate by reason of the negligence of appellant. The declaration consists of two counts which are substantially the same. They aver, in substance, that on April 15, 1912, appellee's intestate was employed as a brakeman by defendant on a freight train; that it was the duty of defendant to furnish him with a reasonably safe place in which to work; that while he, under the direction of defendant, was doing his work of switching in the town of Gridley, the defendant, through its servants, recklessly, carelessly and negligently placed a certain truck loaded with merchandise on its platform at the station in close proximity to the railroad track where plaintiff was engaged in switching; that appellee's intestate had no notice or knowledge of said truck so negligently placed by defendant as aforesaid; that the placing of said truck in said position created a condition of great danger to plaintiff's intestate; that the placing of said truck as aforesaid created a risk and danger of employment which plaintiff's intestate did not assume; that by reason thereof appellee's intestate was struck by said truck and thrown from the side of a freight car and killed.

The tracks of appellant run through Gridley in an easterly and westerly direction. The station at Gridley is on the north side of the main track. East of the station a switch track branches off from the main track and runs in a northeasterly direction. This track is called the "new" or "passing" track. East of the station there is also another switch track branching off from the main track which runs in a southwesterly direction, and from this switch track another switch track branches off running also in a southwesterly direction. South of the depot and a little east

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therefrom is an elevator. The freight train on which appellee was employed as brakeman was known as "Number 23" and arrived at the station of Gridley between 11:45 A. M. and noon. It pulled up in front of the depot and unloaded freight consigned to that station. The deceased was known as the "swing" brakeman. After the conductor receives the switching orders he delivers them to the "swing" brakeman who directs the switching in accordance therewith. A passenger train known as "Number 7" coming from the east was due at Gridley at 12:19 P. M. The freight train did some switching west of the depot and then proceeded eastward onto the passing track east of the station. The switch crew then cut out four cars which were to be delivered to the elevator, and while this was being done the station agent and his assistant wheeled out onto the platform two trucks, one of which was loaded with egg cases. These trucks were placed within a few inches of the edge of the platform for the purpose of delivering express and baggage to the passenger train and to receive the express and baggage to be delivered therefrom at said station. There is evidence tending to show that a flagman was sent east along the main track and that thereupon deceased and another brakeman with the engine and four cars proceeded westward onto the main track for the purpose of delivering the cars to the elevator, which was located on the switch track south of the depot. The deceased, after turning the switch connecting the passing track with the main track, jumped on the side of the last of the four cars, which was a box car, and stood with his feet in the iron step or stirrup and grasping the handle bars. He was hanging on the side of the car which was towards the depot platform on which the trucks were standing. The passenger train at this time could be seen as it was about leaving Meadows, the first station east of Gridley and about four miles distant. The evidence tends to show that

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deceased was looking towards the approaching passenger train, and also that the smoke and cinders from his engine were blowing in his direction from the west. There was evidence tending to show that the freight cars were running westward about twelve miles an hour when the car on which plaintiff was riding approached the depot platform. His body struck the trucks standing thereon and he was hurled from the car and killed.

The main contentions of appellant are that the deceased assumed the risk of striking the trucks because their dangerous proximity to the tracks was open and obvious and could readily have been seen by him, and that he was guilty of contributory negligence in failing to see said trucks, and for the violation of a certain rule of appellant.

The station agent and deceased were not fellow-servants, and the negligence of the station agent in placing said trucks in the manner described was not a risk and hazard assumed by deceased. *Illinois Third Vein Coal Co. v. Cioni*, 215 Ill. 583; *McCoy v. Chicago & A. R. Co.*, 188 Ill. App. 103. There is no evidence tending to show that he had any knowledge that these trucks were on the platform, or that they were too close to the rails to permit him to pass them without injury. Whether he was guilty of contributory negligence in failing to see the trucks or in riding on the car in the position he took, under all the facts and circumstances shown by the evidence, was a question of fact for the jury to determine.

It remains to be determined whether he was guilty of contributory negligence as a matter of law on account of violating the rule of the Company. Rule 89 is as follows:

“89. At meeting points between trains of different classes, the inferior train must take the siding and clear the superior train at least five minutes, and must pull into the siding when practicable. If necessary to

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back in, the train must first be protected as prescribed by Rule 99, unless otherwise provided.

“An inferior train must keep at least five minutes off the time of a superior train in the same direction, and must be clear at the time the superior train is due to leave the last station in the rear where time is shown.”

It is contended that the proper construction of rule 89 is that the word “time” used therein means “schedule” time and that schedule time means the time named in the time cards for the arrival and departure of trains. There was evidence tending to show that when a superior train was late an inferior train kept on with its work until it was necessary to clear the track for the superior train. In our opinion such custom is in accord with a reasonable construction of said rule, otherwise, to suggest a not uncommon occurrence, if the superior train should be an hour or several hours late the inferior train would have to take the siding five minutes before the schedule time for the arrival of the superior train and wait there inactive all that length of time until the superior train should have departed. We cannot seriously believe that any such construction has been observed or followed by the railroads in this country and there is no evidence to sustain it. We do not think this rule requires any construction, but means just what it says, that an inferior train must keep at least five minutes off the time of the superior train, and that the time of the superior train is the actual time when it arrives and departs from the given station. The evidence, moreover, does not conclusively show that the accident happened within five minutes of the arrival of the passenger train. The schedule time of the passenger train for its arrival at Gridley was 12:19. The station agent testifies that it was eight minutes late, though there is no certain evidence of the actual time when it did arrive. There was evidence tending to show that the deceased was informed that the passenger train was

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eight minutes late. The evidence of the time when the accident happened varies according to different witnesses from 12:20 to 12:30. Whether deceased and his train could have proceeded westward the few hundred feet necessary to back in on the elevator siding five minutes before the actual arrival of the passenger train is not shown. The burden of proving the violation of the rule by deceased was upon appellant. We cannot say that the clear manifest weight of the evidence shows that the rule was violated by him. The agent knew that deceased was engaged in switching cars. He also knew that the four cars in question were to be placed on the elevator siding, as he himself had received the orders for the placing of said cars and delivered them to the conductor of the freight train. The question of fact as to whether the deceased was violating these rules at the time of his death was directly submitted to the jury by the fifth, sixth, seventh and eighth instructions given for appellant. Each one of these instructions direct the jury to find appellant not guilty if they should believe from the evidence that he was killed in consequence of his violation of this rule.

The errors assigned to the giving of instructions on behalf of appellee are most seriously argued with reference to instruction number 9. This instruction attempts to define what risks were assumed by deceased, and, among other things, says: "And you are further instructed that the law is that the servant does not assume risks that are unreasonable or extraordinary, nor risks that are extrinsic to the employment, *nor risks of the master's own negligence.*" The rule stated in the instruction that a servant does not assume the risks arising from the master's negligence has been sustained in many cases, and the same rule has been condemned in several cases. In the case of *Klofski v. Railroad Supply Co.*, 235 Ill. 146, the Court

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points out the distinction in the application of this abstract rule in the two classes of cases and holds:

“The distinction between the two classes of cases is readily discernible when the cases themselves are carefully studied and analyzed. It will be found that the cases which exclude from the risks assumed by the servant such dangers as arise from the master’s negligence are cases involving a consideration of the usual and ordinary hazards of the employment which are assumed by the original contract of hiring, and that the other line of cases which hold that the servant may assume dangers arising from the master’s negligence are cases where the assumption of the danger depended not upon the contract of hiring but upon the knowledge of the servant of the existence of the danger. If the servant has, or by the exercise of reasonable care would have, knowledge of the existence of a particular danger and continues in the employment without complaint he will be deemed to have assumed the danger; and in respect to such dangers it is wholly immaterial whether they arise from the negligence of the master or from other causes. * * * The master’s negligence is not an ordinary and usual risk of the employment, hence the servant does not assume dangers arising therefrom by his contract of hiring, but the servant knowing of such negligence may assume the risk, and in such case he assumes it because he knows of it, and not because it has become an ordinary one.”

There is no evidence in the case at bar that the deceased knew the truck had been placed upon the platform, nor that it had been placed so close to the rails as to make it a menace to his safety in the performance of his duties. It cannot be said as a matter of law that he had an equal opportunity with the master of knowing its position. In the *Klofski* case, *supra*, the Court further said:

“If appellant negligently employed an incompetent servant and set him to work with appellee, thereby exposing appellee to danger from the incompetency of such servant, such a danger is not one of the ordinary

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and usual hazards of the employment which appellee assumed by his contract of hiring. If he assumed such danger at all, it would only be upon the supposition that he knew of such incompetency, and voluntarily, without protest, continued in such employment. Whether he had such knowledge or ought to have had such knowledge was a question of fact for the jury. Appellee's contention was that he had no such knowledge and had not sufficient opportunity to acquire it. Upon the assumption that the jury would adopt appellee's theory of the facts, he was entitled to have them instructed as to the rule of law applicable to his theory of the case."

In the case at bar the declaration alleged that deceased had no knowledge of the position of this truck on the platform nor the danger arising therefrom, and that he did not assume the risk thereof. In the *Klofski* case the Court continues:

"If on the other hand, as appellant contends, appellee had knowledge of the incompetency of his co-employee, or if, under the circumstances, by the exercise of ordinary care he ought to have had such knowledge, then appellant was entitled to have the jury instructed that appellee would assume the dangers arising from the known incompetency of the employee Scotty. The law as applicable to appellant's theory of the facts was fully presented to the jury by instructions 18, 19, 20 and 21 given on behalf of appellant. By these several instructions the jury were told, in various forms of language, that the servant assumed not only the ordinary and usual risks connected with his work, but also all extraordinary and unusual risks and dangers of which he had knowledge or by the exercise of reasonable care ought to have had. The instruction under consideration, when read in connection with the other instructions of a series, was not erroneous or misleading."

In the case under consideration, the third, fourth, twelfth and thirteenth instructions given on behalf of appellant directed the jury to find appellant not guilty if they believed from the evidence that the truck was

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in plain view and could have been seen by deceased had he been in the exercise of ordinary care and caution for his own safety, or if he had an equal opportunity with appellant of ascertaining the location of the truck in question. These questions of fact were all properly submitted to the jury. Considering these instructions as a series the jury could not have been misled as to the application of the rule of assumed risk.

The criticisms of the first, second, fifth, seventh, eighth and twelfth instructions given on behalf of appellee we do not think are well founded. Twenty-four instructions were given on behalf of appellant and there was no error in the refusal of the two refused instructions offered by it.

The judgment of the Circuit Court will be affirmed.

Affirmed.

Thomas Cooper, Defendant in Error, v. Robert Burgess & Son, Plaintiffs in Error.

(Not to be reported in full.)

Error to the Circuit Court of Fulton county; the Hon. GEORGE W. THOMPSON, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed October 16, 1914.

Statement of the Case.

Action in assumpsit by Thomas Cooper against Robert Burgess & Son.

Plaintiff sued to recover damages by failure of defendants to deliver to him a pure bred Percheron stallion as they had contracted to do, and delivering him instead a worthless and inferior stallion.

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The trial resulted in a judgment in favor of the plaintiff and against defendants for seven hundred dollars and costs. To reverse the judgment, defendants prosecute error.

BARNES & MAGOON, for plaintiffs in error; J. D. BRECKENRIDGE, of counsel.

CHIPERFIELD & CHIPERFIELD, for defendant in error.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

1. EVIDENCE, § 356*—*when witness qualified to give opinion.* In an action in assumpsit for damages alleged to have been caused by failure of defendants to perform their contract to sell plaintiff a pure bred Percheron stallion and by their having substituted therefor a French draft stallion, witnesses, mostly farmers residing in the same county as plaintiff who had owned and handled stallions, are competent to testify that while they had little or no knowledge of the value of French draft stallions, yet such stallions would be of little or no value for breeding purposes in that county by reason of the scarcity of French draft mares there, and the weight of their testimony is a question for the jury.

2. WITNESSES, § 298*—*when refusal to admit evidence as to veracity harmless.* While evidence that the reputation for truth and veracity of a witness to an oral contract was bad at a period four years before the making of the contract is not too remote, refusal to admit it is not reversible error where the evidence was merely cumulative.

3. WITNESSES, § 298*—*when evidence as to reputation for veracity inadmissible.* Objection to evidence to prove the general reputation for truth and veracity of a witness to an oral contract in a certain vicinity is properly sustained where there was no evidence that he had ever lived in that vicinity, but the evidence showed that during the period to which the character evidence related the witness had lived elsewhere.

4. TRIAL, § 99*—*when objection to admission of evidence made too late.* Objection to the admissibility, in an action in assumpsit, of the proof of value, at a specified time and place, of the stallion to which the action related comes too late when first urged on appeal.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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5. INSTRUCTIONS, § 151*—*when refusal to instruct as to principle already covered proper.* Where the principle of law embodied in a refused instruction is fully covered by other instructions, its refusal is not harmful error.

THOMPSON, P. J., took no part in the consideration of this case.

The People of the State of Illinois, Defendant in Error, v. Perry McKinzie, Plaintiff in Error.

(Not to be reported in full.)

Error to the Circuit Court of Fulton county; the Hon. GEORGE W. THOMPSON, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914.

Statement of the Case.

Prosecution by the People of the State of Illinois against Perry McKinzie on a charge of trespass. From a judgment of a justice of the peace, defendant appealed to the Circuit Court. To reverse the judgment of the Circuit Court he prosecutes error.

CHIPERFIELD & CHIPERFIELD, for plaintiff in error.

M. P. RICE, for defendant in error.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

1. TRESPASS, § 49*—*when evidence sufficient to show.* Where land was rented under an agreement that a part thereof should be kept in hay, the rental of such part to be fixed each year by the price of hay in the vicinity, and a controversy arose between the lessee and the lessor's agent about the price for the hay while a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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part of the tract was in hay, and the agent sold the hay to others and went on the field with them to measure it after the lessee had warned him off and had also posted trespass notices and locked the gates, *held* such agent was guilty of a violation of Hurd's R. S., c. 38, § 266, J. & A. ¶ 3958.

2. CRIMINAL LAW, § 93*—*when arraignment and plea unnecessary on appeal to Circuit Court.* On an appeal to the Circuit Court from the judgment of a justice finding a defendant guilty of a misdemeanor, it is not necessary, under Hurd's R. S., c. 79, art. XVIII, §§ 9, 72, J. & A. ¶¶ 7033, 7038 n, p. 3841 that plaintiff in error be arraigned and a plea of not guilty be entered in the Circuit Court.

THOMPSON, P. J., took no part in the consideration of this case.

Shandrow & Kern, Appellees, v. Rust, Swift & Company, Appellants.

(Not to be reported in full.)

Appeal from the Circuit Court of Calhoun county; the Hon. HARRY HIGBEE, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914.

Statement of the Case.

Action by Shandrow & Kern, as partners, against Rust, Swift & Company, partners, to recover an account for goods sold. The action was originally brought before a justice of the peace, and on an appeal to the Circuit Court the trial resulted in a verdict for plaintiffs and judgment was entered thereon. From this judgment, defendant appeals.

The only question involved is whether or not the evidence is sufficient to establish that the goods were sold to defendants, or to another.

Evidence for plaintiffs tended to show that the contract was that of defendants and their contention was supported by the testimony of the third person. De-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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fendants' evidence tended to show that they had no connection with the contract, but that it was the contract of such third person.

JOHN J. BRENHOLT, for appellants.

CHARLES J. MACAULEY and T. J. SELBY, for appellees.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

CONTRACTS, § 389*—*when execution a question for jury.* Evidence as to whether contract for purchase of goods was made by defendants or by a third person, examined and *held* that question was for the jury and that a verdict was not manifestly against the weight of evidence.

Romeo A. Owings, Executor, Appellee, v. Lewis L. Lehman, Appellant.

1. CONTRACTS, § 65*—*when agreement as to price sufficiently certain.* A contract for the sale of bank stock which provides that it shall be "at \$230.00 per share with any additions there may have been made to the contingent or surplus fund since the date of this agreement," is not void for uncertainty in its terms as to the price to be paid for the stock.

2. CONTRACTS, § 143*—*when option contract not in violation of Statute of Wills.* An option contract for the sale of bank stock which confers on one party a priority of privilege to purchase, in the event that the other desires to sell, at any time within ten years from its date, and makes it binding upon the latter's heirs, executors or administrators and directs that in case of such latter's death before the expiration of the option period, her executor or administrator shall deliver the stock at the agreed price, is not invalid as an attempted testamentary disposition of the stock without compliance with the Statute of Wills.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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3. **CONTRACTS, § 135***—*when agreement to give priority of privilege to repurchase stock valid.* An agreement whereby the buyer of stock in a national bank gives the seller the priority of privilege to purchase, should the buyer wish to sell for a period of ten years, at an agreed price per share with any additions there may have made to the contingent or surplus fund after the date of the agreement, is not unreasonable nor contrary to public policy.

Appeal from the City Court of Mattoon; the Hon. JOHN McNUTT, Judge, presiding. Heard in this court at the October term, 1913. Reversed and remanded with directions. Opinion filed October 16, 1914.

VAUSE & HUGHES, for appellant.

HENLEY & DOUGLAS, for appellee.

FRED A. KINZEL, for all minor defendants.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

On the eleventh day of October, 1910, Cora R. Moore, an aged widow, owned ten shares of the capital stock of the Mattoon National Bank and on that day executed her last will and testament and disposed of said stock therein by certain specific legacies. In the spring of 1911 the bank went into voluntary liquidation and the ten shares of stock owned by Mrs. Moore participated in the distribution of the assets of the bank and in due course were fully liquidated. During the process of liquidation of said bank, appellant, Lehman, and others organized the National Bank of Mattoon and appellant became a large subscriber of the capital stock thereof. Mrs. Moore was not a subscriber to the capital stock of the new bank and did not in any manner participate in its organization.

After the organization of the National Bank of Mattoon appellant sold portions of the capital stock subscribed by him and had some contracts for the re-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

purchase of the stock printed for his own personal use. This form was as follows:

“In consideration of the sale of shares of the capital stock of the NATIONAL BANK OF MATTOON to me by Lewis L. Lehman, I hereby agree in the event that I desire to sell the same at any time within ten years, that I will give said Lehman or his heirs or assigns the priority of privilege to purchase the same at his option for ten days. This option to be binding and obligatory upon my heirs, executors or administrators.”

On July 24, 1911, Mrs. Moore and appellant negotiated for the sale to her of ten shares of the stock of the new bank. At this time Mrs. Moore was a very old lady, and as a result of these negotiations appellant added to the printed form with pen and ink the following clause:

“And in case of my prior death, I hereby direct my executor or administrator to deliver to the said Lewis L. Lehman the said ten shares of stock at \$230 per share with any additions there may have been made to the contingent or surplus fund since the date of the agreement.”

Mrs. Moore executed the contract and delivered the same to appellant and received a certificate for ten shares of the stock in the National Bank of Mattoon. Mrs. Moore died on the eighth day of February, 1913. Her executor filed his bill in the City Court in the city of Mattoon for a construction of this contract, and averred therein that owing to the happening of events subsequent to the execution of Mrs. Moore's last will it was impossible to carry out the provisions of the will, and prays that said will may also be construed and that he be advised in regard to his duties thereunder. Appellant filed an answer to the bill, which by order of the court was ordered to stand as a cross-bill, admitting the principal facts in regard to the execution of the will by Mrs. Moore, the liquidation of the stock of the Mattoon National Bank, the organization of the National Bank of Mattoon, the sale of the ten

shares of stock in the latter bank by him to Mrs. Moore, and avers the validity of the contract of repurchase and that he is entitled to receive from the executor the said ten shares of stock in the latter bank upon the payment by him of \$2,450, the same being the value of said stock at \$230 per share, with the additions that have been made to the contingent or surplus fund since the date of the sale, which amount he tenders in open court to be paid to the said complainant upon the assignment and delivery to him of the certificate for said stock. The answers of the various other defendants aver that the contract is void on two grounds: First, that it is too uncertain in its terms as to the price to be paid for the stock; and second, that it is an attempted testamentary disposition of the same and void because not properly executed under the provisions of the Statute of Wills. The chancellor held that the contract was uncertain and ambiguous and not binding upon the estate of Mrs. Moore and that the answer of appellant, in so far as the same stands as a cross-bill, should be dismissed for want of equity.

We do not think the holding of the chancellor that the contract is void for uncertainty can be sustained. The price to be paid for the stock was \$230 per share with any additions that might have been made to the contingent or surplus fund since the date of the agreement. This was readily ascertainable. In the case of *Hayes v. O'Brien*, 149 Ill. 403, where there was a provision in a lease of certain land whereby the lessor reserved the right to sell the land at any time, but covenanted that no sale of the land should be made by him without first giving the lessee the privilege of purchasing upon such terms and at the same price per acre as any other person or purchaser might have offered therefor, the Supreme Court held: "This language is plain and unambiguous, and admits of no construction, other than that the terms and price per acre at which the lessee might purchase were the same as offered by

any other person or purchaser, and which the lessor was willing to accept. * * * In most of the reported cases there has been an offer to sell or an option to purchase at a fixed price named in the written contract. But this is not necessary where the written instrument fixes a definite mode of its ascertainment."

The price to be paid for the stock as fixed by the contract in this case can be much more definitely determined than the price for the land in the case cited; in fact, it is absolutely ascertainable.

In order to determine whether the contract is void as being an attempted testamentary disposition of the stock without the formality of the execution of the contract in accordance with the Statute of Wills, it is necessary to ascertain, if possible, what was the intention of the parties. The fundamental theory of a will is that the disposition of property made therein by devise or bequest is in the nature of a gift. *Beatty's Estate v. Western College of Toledo*, 177 Ill. 280. The contract in question in this case does not contain any elements in the nature of a gift, but on the contrary contains those of an option contract. In attempting to arrive at the intention of the parties to such a contract it is pertinent to consider the conditions surrounding the parties at the time. The new bank was organized by appellant and others and appellant had subscribed for a large portion of the stock. It is not unreasonable to presume that in disposing of some of this stock he would sell it only to individuals whom he cared to have connected with the bank and that he did not want to have the stock get beyond his control, and with that object in view made each purchaser of the stock sign the printed option contract which he had prepared for that purpose, giving him the privilege of rebuying the stock of the bank if the purchaser desired to sell. Mrs. Moore had owned ten shares of stock in the Mattoon National Bank, which went into liquidation, and it is evident she desired to invest the money

derived from this stock in the new bank organized by appellant. She was advanced in years, her life expectancy was short, and with this condition in mind the written portion of the contract was added to the printed contract and executed by her. The consideration for the stock was the money price thereof at the time of the sale and the privilege of appellant to repurchase the same at a certain price in the event she desired to sell the same, or, in case she should die, the privilege of repurchasing the same at a certain price from her executor or administrator. That the incorporators and stockholders of a national bank should seek to control the stock of such an institution or to choose to whom the stock should be sold is not unreasonable nor contrary to public policy. The success of such an institution may largely depend upon the harmony that prevails among the stockholders thereof, and it is certainly for the public interest that such institutions should be operated with success. We fail to see anything unreasonable or obnoxious or uncertain in the terms of this contract, nor do we think it can be held to be an attempted testamentary disposition of the stock and void under the Statute of Wills. The decree of the City Court of the city of Mattoon must therefore be reversed and the cause remanded with directions to enter a decree in accordance with the opinion herein expressed.

Reversed and remanded with directions.

Sparks v. Rayburn, 190 Ill. App. 438.

**Frank Sparks, Appellee, v. Robert G. Rayburn et al.,
trading as the Home Bank, Appellants.**

(Not to be reported in full.)

Appeal from the Circuit Court of Champaign county; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the October term, 1913. Affirmed on remittitur; otherwise reversed and remanded. Opinion filed October 16, 1914. Rehearing denied December 2, 1914. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action of assumpsit by Frank Sparks against Robert G. Rayburn, W. O. Dale, J. N. Black and F. B. Venum, partners as the Home Bank, to recover a balance of deposits made by plaintiff in a bank operated by defendants.

The bank never furnished plaintiff a pass book.

Defendants contended that no formal demand was made, while testimony for plaintiff tended to show demand had been made and refused. The testimony also tended to show that defendants had denied that any balance was due plaintiff.

The errors assigned were the refusal to admit in evidence the ledger of the bank and in giving certain instructions requested by plaintiff.

The jury found the issues in favor of plaintiff and returned a verdict in his favor in the sum of thirteen hundred and fifty dollars, which figure was reached either by a mistake in adding items or by allowing interest which had not been claimed.

To reverse the judgment entered on the verdict, defendants appeal.

DOBBINS & DOBBINS, ASA S. CHAPMAN and C. B. IUNGERICH, for appellants.

Sparks v. Rayburn, 190 Ill. App. 438.

GREEN & PALMER, for appellee; ORIS BARTH, of counsel.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

1. ACTION, § 15*—*when demand not prerequisite.* In an action to recover a balance of a bank deposit alleged to be due, where the evidence tends to show that defendants refused plaintiff's request for a pass book, statement of his account or return of his checks and that they denied that any balance was due him, proof of a formal demand for the deposits is not necessary.

2. EVIDENCE, § 259*—*when books not of original entry inadmissible.* A ledger of a bank which is not a book of original entry, but is made up in part of entries from books of original entry, is inadmissible in evidence.

3. EVIDENCE, § 259*—*when book containing summary from book of original entry inadmissible.* In an action by a bank depositor to recover the balance of his deposit, certificates of deposit issued by the bank are prima facie evidence of deposits, and a ledger which does not contain the original entries but is made up of entries from other books, and the entries in which show, in many instances, not the true amounts of the transactions but their net results, is inadmissible.

4. DAMAGES, § 246*—*when remittitur proper.* Where the verdict of the jury shows that either they made a mistake in the addition of the items claimed or included interest which was not claimed, a remittitur will be entered for the excess.

5. APPEAL AND ERROR, § 1523*—*when error in giving instruction harmless where objection applies to those for both sides.* Where the instructions given on behalf of defendant are open to the same objection as those given on behalf of plaintiff, defendant cannot be heard to complain thereof.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The People v. DeFratis, 190 Ill. App. 440.

The People of the State of Illinois, Defendant in Error, v. Horace DeFratis, Plaintiff in Error.

(Not to be reported in full.)

Appeal from the County Court of Morgan county; the Hon. EDWARD P. BROCKHOUSE, Judge, presiding. Heard in this court at the April term, 1914. Dismissed. Opinion filed October 16, 1914.

Statement of the Case.

Action by The People of the State of Illinois against Horace DeFratis.

To review a judgment entered in favor of plaintiff, defendant sues out a writ of error.

THOMAS F. SMITH, for plaintiff in error.

ROBERT TILTON, for defendant in error.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 722*—*when record insufficient.* Where the record does not show that any bill of exceptions was filed in the court below and made a part of the record, a writ of error will be dismissed.

2. APPEAL AND ERROR, § 864*—*failure to print and file abstract.* Where no abstract has been printed and filed in accordance with the rules of the Appellate Court, the writ of error will be dismissed.

3. APPEAL AND ERROR, § 1094*—*when brief and argument insufficient.* Where in the brief and argument of plaintiff in error no exceptions to any of the rulings on the evidence complained of are shown and no instructions are set out, the writ of error will be dismissed.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

McMasters v. Madison Coal Corporation, 190 Ill. App. 441.

**John McMasters, Administrator, Plaintiff in Error, v.
Madison Coal Corporation, Defendant in Error.**

(Not to be reported in full.)

Error to the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914.

Statement of the Case.

Action on the case by John McMasters, administrator of the estate of Henry McMasters, deceased, against Madison Coal Corporation.

To review a judgment rendered in favor of defendant, plaintiff prosecutes a writ of error.

JOHN E. HOGAN and GEORGE T. WALLACE, for plaintiff in error.

GRAHAM & GRAHAM, for defendant in error.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

APPEAL AND ERROR, § 814*—*when bill of exceptions insufficient.* Where the bill of exceptions does not show that any peremptory instruction was given by the trial court to the jury and contains no instructions, the Appellate Court will not, on a writ of error, review the action of the trial court in directing a verdict.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Thompson v. The Security Insurance Co., 190 Ill. App. 442.

**L. E. Thompson, Appellee, v. The Security Insurance
Company of New Haven, Appellant.**

(Not to be reported in full.)

Appeal from the Circuit Court of Coles county; the Hon. WILLIAM B. SCHOLFIELD, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914.

Statement of the Case.

Action of assumpsit by L. E. Thompson against the Security Insurance Company of New Haven on an oral contract of insurance.

The plaintiff recovered a verdict for six hundred and ninety dollars, on which a judgment was entered. From this judgment defendant appeals, assigning as error that the making of the contract was not proved by a preponderance of the evidence and that the giving of certain instructions was error.

H. A. NEAL, for appellant.

ALBERT C. ANDERSON, for appellee

MR. JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

1. INSURANCE, § 661*—*when evidence sufficient to prove oral contract.* In an action to recover on an oral contract of fire insurance, where plaintiff testifies to the terms of the contract and its making with defendant's agent and is more or less corroborated by his son and by a minor employee who were present, while the making of the contract is denied by defendant's agent, a verdict for plaintiff is not contrary to the manifest weight of the evidence.

2. INSTRUCTIONS, § 151*—*when error in giving harmless.* Where an instruction, though objectionable, could not, when read together with all the other instructions, have misled the jury, it is not reversible error.

SCHOLFIELD, J., took no part of the consideration of this case.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Sherfy v. Lachenmyer, 190 Ill. App. 443.

F. B. Sherfy, Appellant, v. W. A. Lachenmyer, Appellee.**(Not to be reported in full.)**

Appeal from the Circuit Court of Champaign county; the Hon. SOLON PHILBRICK, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914.

Statement of the Case.

Action by F. B. Sherfy against W. A. Lachenmyer on a promissory note executed by plaintiff to his own order and indorsed on the back by him.

Defendant executed a note payable to one Matheny in payment of money lost to the latter in gambling at cards in a gambling room run by the latter. The note came into the hands of the First National Bank for collection. Defendant informed the cashier of the bank that he was unable to pay the note at that time, that it was for money lost at gambling, and executed in renewal thereof the note on which this action brought. The court directed a verdict for defendant and from the judgment thereon, plaintiff appeals.

WALTER B. RILEY and FRED B. HAMILL, for appellant.

GREEN & PALMER and ACTON & ACTON, for appellee;
ORIS BARTH, of counsel.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

GAMING, § 18*—*when renewal note in hands of innocent purchaser void.* A renewal note is void, though in the hands of an innocent purchaser, where the consideration of the first note was a gambling debt.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Frankenberg v. Frankenberg, 190 Ill. App. 444.

Mary B. Frankenberg, Appellant, v. Carl V. Frankenberg, Appellee.

1. DIVORCE, § 9*—*when decree for desertion proper.* Where a husband deserts his wife for more than two years because she refuses to pay his debts she is entitled to a decree for divorce on the grounds of desertion.

2. DIVORCE, § 39*—*when evidence as to prior marriage and divorce incompetent.* In a suit for divorce the admission of evidence that plaintiff had been married and had been divorced from her former husband and that there were no children of that marriage and the husband was dead is error.

3. DIVORCE, § 53*—*when refusal to permit plaintiff to dismiss bill not error.* After a verdict has been rendered in a suit for divorce and a motion to set aside the verdict and for a new trial has been overruled, it is not error to refuse to permit plaintiff to dismiss her bill.

Appeal from the Circuit Court of Morgan county; the Hon. OWEN P. THOMPSON, Judge, presiding. Heard in this court at the April term, 1914. Reversed and remanded with directions. Opinion filed October 16, 1914.

BELLATTI & BELLATTI, for appellant.

M. T. LAYMAN, for appellee.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

Appellant filed her bill for divorce from appellee, in which she alleged that they were married February 15, 1894, and that two children were born of said marriage, both of whom are now over sixteen years of age, and that on May 16, 1911, appellee wilfully and without any reasonable cause absented himself from her for more than two years. The answer of appellee admits the marriage and the birth of the children, but denies that he deserted the complainant as charged in her bill. The issue was heard before a jury which

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

rendered a verdict in favor of appellee. A motion to set aside the verdict and for a new trial was made by appellant and overruled. Appellant then made a motion for leave to dismiss her bill, which was overruled. Thereupon the chancellor, instead of dismissing the bill for want of equity, entered a judgment against appellant in bar of the action.

Three assignments of error are urged in this court: First, that the chancellor should have granted a new trial on the ground that the verdict is contrary to the evidence; second, that the court erred in permitting certain evidence to be introduced on behalf of appellee; and third, that the court erred in denying the right of appellant to dismiss her bill after the motion for a new trial was overruled.

Appellee is a tailor in the city of Jacksonville and had no income except what he derived from his business. He had been married to appellant about eighteen years. They lived in a house owned by appellant's mother. During the early part of their married life appellee was engaged in selling skirts. These skirts were made by appellant on machines in the house. Subsequently appellee opened a tailor shop and appellant helped him more or less in that business. The evidence clearly shows without contradiction that appellant had always been a true and faithful wife to appellee and had helped him more or less in his work from the time they were married. It appears from the evidence that appellant received some property on the death of her father and that appellee was persistent in asking appellant for money, as he claimed, to pay his debts. Appellee's own testimony shows no legal ground for his desertion. In substance it is as follows: "It was probably six or seven weeks previous to leaving that I did not furnish the family with everything. I was in debt and wanted to pay my indebtedness before I went further in debt. When some bills became due, especially gas bills, in order to

get the discount I told her that I was unable to pay my bills. She made no reply. I knew that she had money. I went out and borrowed to pay for these things, only I could not pay very long as hard up as I was. As to what was said and done about my not furnishing the family with anything, when I asked her if she did not expect to help me out in any way she said she would do nothing. Well, I said that I would do nothing either. We will just quit where we are. This was said the day before I left the house. I never asked her for half of what she had or anything like that. I never asked her to deed me half of the property her father had left her. I supported my family to the best of my ability. It was about 8:30 the morning that I left the house. I told my wife there was no use trying to live like we were, and that the best thing I could do was to go and let her enjoy her money. My little daughter then came up and I told her it was useless for me to stay there under the circumstances. She cried and asked, 'What will I do?' I said, 'Do the best you can—get along the best you can—if you cannot get along here, come to me. I will always take care of you.' That made her sob and cry more. Then my wife got vexed at this and she said to me, 'You dirty dog, you go on and get your things and get out of here.' I said, 'I will go when I get ready,' and my little girl still hung to me and cried. My wife said, 'You brute, you go and let her alone. Don't work on the sympathy of your child. Take your things and get out of here.' I said, 'I will go in a few minutes and bother you no more.' She said, 'Bring your trunk out, as I want to lock the door and go down town.' I took my trunk and moved it outside. The reason I left was that they did everything to provoke me and wanted me to leave. My wife would stay away with the children for more than a week at a time and never write to me. The morning that I left I offered to kiss my wife, but she would not let me, so I told her it was useless to try to live together—we could be friends

just the same—I had no ill feeling towards her. If she felt that greed should hold her to it, all right. I would get along by myself. By greed I mean her refusal to give me money.” The conversation with the wife as above testified to by appellee is denied by her and the daughter. Admitting all the facts to be true, as testified to by appellee, they fall far short of showing that the desertion was for a reasonable cause. It has been held that the reasonable cause which justifies a husband’s desertion and abandonment of his wife must be such as would entitle him to a divorce. *Fritz v. Fritz*, 138 Ill. 436; *Walton v. Walton*, 114 Ill. App. 116. The fact that a wife will not pay the debts of her husband has not yet been declared to be a ground for divorce on his part. The evidence clearly shows that appellee had deserted and abandoned his wife for more than two years without reasonable cause and that she was entitled to a decree for divorce. The chancellor erred in not setting aside the verdict and granting a new trial.

On the cross-examination of appellant the court permitted counsel for appellee, over objection, to show that she had been married once before and had been divorced from her husband, that there were no children born of said marriage and that her former husband was now dead. This was clearly incompetent. It had nothing to do with the issues in this case. The only purpose such evidence could serve would be to possibly prejudice the jury against appellant. In the argument of counsel for appellee to the jury, over objection, he made these remarks: “Mrs. Frankenberg had been divorced before. Well, there was a divorce. Didn’t I get that right? All right—which ever way you want that—she is divorced before, whether she got it or her husband got it—I don’t care—but the fact is she is not new in a court room on divorce—she is not a stranger to it—she has been divorced before—either she or her husband—I don’t know—I don’t care. They objected. I told her not to answer

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until they objected. They objected and the court said it was competent evidence. That was right. I want you to consider that fact together with all the other facts and circumstances." The court erred in allowing this evidence to be given and in permitting counsel to make said argument to the jury thereon. It might be possible that in some cases under some circumstances evidence of a prior marriage and divorce would be competent, but in the present case there was nothing whatever that could make such evidence competent.

The court did not err in refusing to permit appellant to dismiss her bill after the verdict was rendered and the motion to set aside the verdict and for a new trial had been overruled. Under the statute either party has a right to have the issues in a bill for divorce determined by a jury, and the trial has all the incidents of a trial at common law and the verdict has the same force and effect as a verdict in an action at law. It is not merely advisory as in an ordinary chancery suit. *Garrett v. Garrett*, 252 Ill. 318; *Biggerstaff v. Biggerstaff*, 180 Ill. 407. The general rule of chancery practice, that in the absence of a cross-bill a complainant has a right to dismiss the bill at any time before the decree is entered, does not apply to such chancery cases, the issues wherein the statute has provided may be determined by a jury. *Gifford v. Gifford*, 154 Ill. App. 416. To grant a motion to dismiss a bill in such a case after a verdict has been rendered by a jury would be equivalent to permitting the complainant to suffer a nonsuit. The Practice Act provides that every person desirous of suffering a nonsuit shall be barred therefrom unless he do so before the jury retire from the bar. In a chancery case where the statute gives either party the right to have the issues determined by a jury, a motion to dismiss the bill without prejudice comes too late after the jury has retired to consider its verdict.

Shellebarger Elevator Co. v. Jenson, 190 Ill. App. 449.

For the reasons indicated the judgment of the Circuit Court will be reversed and the cause remanded with directions to set aside the judgment and to set aside the verdict and grant a new trial.

Reversed and remanded with directions.

Shellebarger Elevator Company, Appellant, v. Jens Jenson, Appellee.

(Not to be reported in full.)

Appeal from the Circuit Court of Ford county; the Hon. GEORGE W. PATTON, Judge, presiding. Heard in this court at the April term, 1914. Reversed and remanded. Opinion filed October 16, 1914. Rehearing denied December 2, 1914.

Statement of the Case.

Action of assumpsit by Jens Jenson against Shellebarger Elevator Company to recover for corn sold defendant.

Plaintiff contended and introduced evidence to show that he had sold certain corn to defendant. Defendant introduced evidence showing that there was no contract of sale but that the grain was received by it in storage only. The elevator and the grain were destroyed by fire about two years and a half after the date the sale was claimed to have been made.

The declaration contained only the common counts, but defendant filed in addition to the general issue a special plea alleging that at the time it was operating a class B elevator and received grain on storage only. Issue was joined on this plea by general replication.

The trial resulted in a verdict by the jury for the plaintiff and judgment was entered thereon. From this judgment, defendant appeals.

Shellebarger Elevator Co. v. Jenson, 190 Ill. App. 449.

A. L. PHILLIPS and J. R. FITZGERALD, for appellant.

SOHNEIDER & SCHNEIDER, for appellee.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

1. INSTRUCTIONS, § 114*—*when not clear*. In an action to recover for grain which plaintiff claimed was sold to defendant and defendant claimed was received on storage and destroyed by fire, where the defendant filed, in addition to the general issue a special plea on which issue was joined by a general replication, an instruction that "unless the defendant has shown by the greater weight of the evidence that at the time of the fire in question, it, the defendant, had stored in the elevator as much corn as of good quality and grade as that delivered to the defendant by the plaintiff, as it was then chargeable for to all other parties who had corn of that character stored in the elevator, it will be your duty to find for the plaintiff on that issue," is improper in that it does not state to what issue it has reference.

2. INSTRUCTIONS, § 114*—*when order of findings not properly stated*. In an action to recover for grain which plaintiff claims was sold to defendant and defendant claims was received for storage in its elevator and burned without its fault, an instruction to the jury to consider how much grain the defendant had in the elevator at the time it was burned, which does not direct that they shall first find whether the contract was one of storage or of sale, is improper.

3. INSTRUCTIONS, § 114*—*when not conforming to issues*. Where, in an action to recover for grain, plaintiff claims that the grain was sold to defendant and defendant claims that it was received by it for storage in its elevator and while so stored was burned without its fault, it is error to instruct that, "the defendant has pleaded as one of his defenses that the corn in question was stored in the elevator and not sold as claimed by the plaintiff; before you will be justified under the law to find for the defendant on that issue, you must believe from the greater weight of the evidence that defendant has shown that it, the defendant, used reasonable care and diligence to protect the corn from loss by fire."

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Razor v. Bloomington & Normal Ry. & Light Co., 190 Ill. App. 451.

**Charles Razor, Appellee, v. Bloomington & Normal
Railway and Light Company, Appellant.**

(Not to be reported in full.)

Appeal from the Circuit Court of McLean county; the Hon. COLSTON D. MYERS, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914. Rehearing denied December 2, 1914.

Statement of the Case.

Action on the case by Charles Razor against the Bloomington & Normal Railway and Light Company for personal injuries.

Plaintiff was struck by one of defendant's street cars at a crossing at the intersection of two streets where cars coming from the west on one street turned the corner and ran north on the other. The accident happened between eight and nine o'clock on a November evening. It was raining and plaintiff was carrying an umbrella. He charged negligence on defendant's part as follows: (1) Mismanagement and unskillfulness in running the car; (2) not sounding a gong or ringing a bell; (3) wilfully and negligently driving the car against him; (4) failure to have car equipped with a fender and proper guard; (5) running the car at a dangerous rate of speed and contrary to the ordinance fixing the limit at five miles an hour; (6) carelessly, improperly and negligently driving and managing the car, whereby plaintiff was injured. The evidence on the question of the speed of the car and the sounding of the gong was conflicting.

The jury found the issues for the plaintiff and assessed his damages at seven hundred dollars. From the judgment entered on the verdict, defendant appeals.

Razor v. Bloomington & Normal Ry. & Light Co., 190 Ill. App. 451.

LIVINGSTON & BACH, for appellant; SIGMUND LIVINGSTON, of counsel.

LIGHT & LIGHT, for appellee.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

1. STREET RAILROADS, § 133*—*when negligence in speed of car question for jury in action for injury to pedestrian.* In an action by a pedestrian to recover for injuries by being struck by a street car, where plaintiff's evidence shows that the car was running at a minimum speed of eight miles an hour, while defendant's evidence shows that the speed did not exceed two miles an hour, the question as to whether defendant was negligent in the rate of speed at which it operated its car is for the jury.

2. STREET RAILROADS, § 135*—*when contributory negligence question for jury in action for personal injuries.* Where the evidence is conflicting, in an action by a pedestrian to recover for personal injuries from a street car, the question of contributory negligence is for the jury.

3. EVIDENCE, § 399*—*when opinion of medical expert inadmissible in answer to hypothetical question.* A medical expert, in answering a hypothetical question, cannot give his opinion on the fact which the jury is to determine.

4. APPEAL AND ERROR, § 1499*—*when improper admission of evidence harmless error.* The admission of improper evidence as to the extent of a plaintiff's injuries, in an action for personal injuries, is not reversible error where defendant offered no evidence in regard thereto, and the verdict was not excessive if the injuries were of the extent which plaintiff's evidence tended to show they were.

5. INSTRUCTIONS, § 83*—*when not improper.* Certain instructions in an action for injuries by being struck by a street car, held not misleading or improper.

6. APPEAL AND ERROR, § 1531*—*when instruction not misleading.* In an action to recover for personal injuries by being struck by a street car, an instruction which assumes that the car struck plaintiff, while defendant contends that plaintiff walked into and struck the car, is not misleading.

7. PLEADING, § 431*—*when proof not at variance with declaration.* In an action for personal injuries by being struck by a street car, held that there was no variance between the declaration and the proof.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

J. Walter Dunsworth, Appellee, v. W. D. Chemical Company, Appellant.

REPLEVIN, § 7*—*when not proper to recover note.* Where the execution of a note was not secured through fraud or deceit, and it was supported by a good consideration when executed and it was delivered by the maker to the payees, the maker cannot, on the grounds of his right to rescind, breach of contract and failure of consideration, recover possession of the note by replevin.

Appeal from the County Court of Hancock county; the Hon. J. ARTHUR BAIRD, Judge, presiding. Heard in this court at the April term, 1914. Reversed. Opinion filed October 16, 1914. Rehearing denied November 6, 1914.

O'HARRA, O'HARRA, WOOD & WALKER, for appellant.

HARTZELL, CAVANAGH & BABCOCK, for appellee.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

On the sixth day of March, 1913, appellant and appellee entered into a written contract in which it was provided that in consideration of the right of appellee to sell the goods that day ordered of appellant in Hancock county during the period of mutual satisfaction, appellee agreed to sell said goods at certain prices; that appellant agreed to send one of their men before the expiration of sixty days to canvass with and assist appellee in selling of the goods without any charge for the services of the assistant, and that said assistant should turn over to appellee the entire proceeds of all sales made by him; that in case of the failure of appellant to send said assistant within sixty days, appellant agreed at the expiration of that time to take charge of all unsold goods and credit the same to appellee's separate covenants covering the goods that day ordered by him; that appellant agreed to send to appel-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Dunsworth v. W. D. Chemical Co., 190 Ill. App. 453.

lee literature free of charge to be distributed to the stock raisers for advertising purposes.

The goods mentioned in the contract were stock powders. On said day appellee ordered 6,000 pounds of these stock powders called "Protection Stock Powders," and executed his note for the principal sum of three hundred and sixty dollars, payable to the order of appellant ninety days after date. The evidence shows that these stock powders were to be delivered to appellee at the price of six cents per pound and that appellee was to sell them for higher prices and was to retain the difference. Three thousand pounds of the stock powders were shipped to appellee and at the time of the trial were stored on his premises, the remaining 3,000 pounds were afterwards shipped to appellee and he refused to receive the same. None of the stock powders were sold by appellee. The note became due and appellee requested appellant by letter to send the note to the Hancock National Bank at Carthage. Appellant did so, and as soon as the bank received it appellee demanded possession of the note, which, being refused, he brought this action in replevin to recover the possession of the note. The jury found the issues for appellee, and from the judgment on that verdict this appeal is prosecuted.

It is contended by appellee that the contract running only during a period of mutual satisfaction he had a right to rescind it at any time he saw fit, and he never having sold any of the powders, the consideration of the note has failed and he is entitled to the return of the note to his possession. It is also urged that appellant breached the contract by failing to send a man within sixty days to assist him in the sale of the goods. The evidence shows that a man was sent to him within the sixty days, but appellee claims he was prevented from taking advantage of it at that time on account of the illness of his wife and that appellant should have again sent a man for that purpose, and

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first notify appellee of the time when he would arrive so that he would be prepared to go out with him for the purpose of selling the goods.

We cannot agree with counsel for appellee that an action of replevin is a proper remedy under such circumstances, and we have been unable to find any authority to sustain such a procedure. The execution of the note was not procured through fraud or deceit, so far as this record shows, and at the time of its execution it was supported by a good consideration. The title to the note passed to appellants when it was delivered to them by appellee, and if there are any defenses to it they can be availed of by appellee when an action is brought to recover thereon.

It is unnecessary to pass upon the other propositions advanced by counsel in this case. The judgment will be reversed.

Reversed.

John B. Sutton, Appellant, v. Findlay Cemetery Association, Appellee.

1. WATERS AND WATER COURSES, § 23*—*when pollution by cemetery enjoined.* On a suit to enjoin defendant from selling or attempting to sell lots in its premises for burial purposes or to enter bodies therein or to permit them to be interred, where plaintiff introduces a number of expert witnesses who substantiate the allegations of his bill that a water course used by him to water his stock will be contaminated by bacteria and poisonous exudations from the decomposition of human bodies in the cemetery, and defendant introduces three local physicians, who do not qualify as experts, but testify that in their opinion no deleterious effects will be produced, an injunction will be granted.

2. WATERS AND WATER COURSES, § 23*—*when fact of previous pollution by another not ground for denial of injunction.* In a suit to enjoin a cemetery company from polluting a water course, the fact

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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that the waters have already been polluted by the deposit of sewage from a village is not ground for denial of the injunction.

SCHOLFIELD, J., dissents.

Appeal from the Circuit Court of Shelby county; the Hon. ALBERT M. ROSE, Judge, presiding. Heard in this court at the April term, 1914. Reversed and remanded with directions. Opinion filed October 16, 1914. Rehearing denied December 2, 1914. *Certiorari* allowed by Supreme Court.

DOVE & DOVE, for appellant.

E. A. RICHARDSON and WHITAKER, WARD & PUGH, for appellee.

MR. JUSTICE ELDBEDGE delivered the opinion of the court.

This is a suit in chancery, the purpose of which is to procure an injunction restraining appellee from selling or attempting to sell any lot or lots in its premises for burial purposes and from interring or permitting to be interred any bodies therein. The bill as amended, in substance, avers that appellee is a corporation and is the owner of ten acres of land adjoining appellant's land on the west; that said tract of land has been surveyed and platted preliminary to laying out a cemetery therein; that it is close to the corporate limits of the village of Findlay, having a population of about one thousand people; that the village of Findlay has no cemetery or burial ground, but that the nearest one is a country graveyard three miles distant, that the purpose of appellee is to sell lots to the public and to use said land as a public cemetery; that in said premises and near the west line of the land owned by appellee is the head of a natural water course which is known as the west fork of the "Everman Branch"; that said natural water course continues in an easterly direction through the premises of appellee and through the land of appellant and gradually widens as it continues eastward and eventually empties into

the Okaw River; that the natural drainage of all the lands of appellant and appellee is towards this branch, and that said cemetery is low and flat with but a slight fall towards the branch; that during eight or nine months of each year there is considerable water in said branch and it is a running stream during that portion of the year; that for at least that length of time said branch contains water sufficient in quantity and of sufficient purity to furnish drink for cattle, horses, hogs and other domestic stock kept by appellant; that appellant has resided on his land for more than ten years and makes his home thereon; that during all that time that portion of his land adjoining said water course on both sides has been used for pasturing purposes and for watering his stock; that appellee is constructing a tile ditch by means of which it is proposed to drain and underdrain its cemetery; that the outlet for said tile drain is to be in said natural water course; that by reason of said cemetery being used for burial purposes the discharge from said tile drain would carry contamination and the waters therefrom would be unhealthy and unfit for drinking purposes for cattle, horses, hogs and all kinds of stock, and that the lands of appellant through which said water course runs and into which the drainage of said cemetery would empty would, by reason of said discharge from said drain, be rendered unfit for dairy purposes and stock raising, and said discharge from said drain would cause noxious odors to spread over the farm of appellant and about his place of residence, thereby rendering the same unhealthy and uncomfortable as a place to live, and irreparable damage would be caused and a nuisance would thereby be created; that during several months of each year said land is so water-logged that in order to render said premises suitable for burial purposes it is necessary to properly drain and underdrain the same; that in the event said premises are so drained the discharge from said drain after inter-

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ment of human bodies therein would contain bacteria and poisonous exudations from decomposing human bodies, which discharge would be emptied into said natural water course and so carried upon the lands and premises of appellant; that injurious products of decomposition would emanate from said bodies; that water percolating through the soil would take up these emanations and such waters would thereby be rendered poisonous and contaminated, and would percolate into and upon the land of appellant and also into said natural water course and would be carried into and upon the lands of appellant, by reason whereof the lands and stock of appellant would be greatly depreciated in value and the milk and cream of cows pasturing upon the land of appellant and butter therefrom would be decreased in value, if not rendered wholly unsalable.

The answer admits the ownership of the cemetery and the purpose thereof as alleged in the bill and that the natural drainage of the lands of both appellant and appellee is towards said water course and that a tile drain has been constructed by means of which it is proposed to drain and underdrain said cemetery, and that the outlet of said drain is in said natural water course; it denies that the cemetery is low and flat and that said water course is a running stream eight or nine months in the year and that it contains water sufficient in quantity for cattle, horses and hogs during that time, and that appellant has been accustomed to use said water course for watering his stock; that by reason of said cemetery being used for burial purposes the discharge of said tile drain would carry contamination and would be unhealthy and unfit for drinking purposes for all kinds of stock, and that the land of appellant will be rendered unfit for dairy purposes and that they will be rendered unhealthy and uncomfortable as a place in which to live. The answer avers that said cemetery consists of a clay subsoil;

that all the tiles and drains which appellee put in said premises are for the purpose of carrying off surface water from the premises and that the tiles and drains constituting the underdrainage are made in the center of the driveways; that no grave will be closer than eighteen feet to the tile and that the tile will be but a little lower than the bottom of the graves; that it will be impossible for any portion of the decomposed bodies to reach said tile or to go on to the premises of appellant; that no noxious gases can enter into said tile, etc. The answer further avers that all the drainage from the village of Findlay is carried into said water course and that appellant never made any complaint to appellee until after appellee had spent several thousand dollars in purchasing and improving these grounds.

Appellant introduced the testimony of a number of expert bacteriologists whose testimony substantially sustained the averments of the bill as to the contention of the water in the water course being contaminated by bacteria and poisonous exudations from the decomposition of human bodies in the cemetery. Appellee introduced the testimony of three local physicians, who did not qualify as experts, but who testified that in their opinion no such deleterious effects would be produced. The pleadings and facts in this case are substantially analogous to those in the case of *Barrett v. Mt. Greenwood Cemetery Ass'n*, 159 Ill. 385. In that case it was held that an injunction should issue, and we feel bound by the rule therein announced. One expert witness who testified in the case at bar also testified in that case. The claim that the waters in this stream have already been polluted by drainage from the village of Findlay, and therefore an injunction would be unavailing, cannot be sustained. The same contention was made in the *Barrett* case, *supra*, and the Supreme Court held: "But we know of no rule of law that sanctions one wrong because another has preceded it." We are constrained to hold upon the authority of the *Barrett* case, that the chancellor erred in dismissing the bill

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for want of equity, and the decree must be reversed and cause remanded with directions to enter a decree granting the injunction prayed for.

Reversed and remanded with directions.

MR. JUSTICE SCHOLFIELD dissents.

Frances E. Arrowsmith, Appellee, v. Old Colony Life Insurance Company, Appellant.

1. APPEAL AND ERROR, § 1725*—*when judgment on former appeal conclusive.* Where a third appeal involves no issue which might not have been presented on the former appeals, every question which might have been presented in the former actions and appeals is *res adjudicata*.

2. APPEAL AND ERROR, § 1733*—*when exception to rule of res adjudicata not allowed.* On a third appeal, the negligence of a litigant in failing to discover facts practically wholly within his own means of ascertainment is not a ground for setting aside the rule of *res adjudicata*.

3. INSURANCE, § 122*—*when application for original life policy a part of reinsurance.* Where a life insurance policy, reinsuring one who held a policy in another company, makes the application to such other company a part of the reinsurance policy, but makes no reference to the original policy, the original application and the reinsurance policy constitute the entire contract between the policy holder and the reinsurer.

4. INSURANCE, § 122*—*when terms of original application for life insurance control reinsurance policy.* A policy reinsuring one who held a policy in another company made his original application a part of the reinsurance policy. The application provided that suicide within two years from its date was not a risk assumed by the original insurer. The reinsurance policy provided that in case of suicide within two years from its date, the reinsurer would repay the premiums with five per cent. interest, but should not otherwise be liable. The insured committed suicide more than two years after the date of the original application, but less than two years after the date of the reinsurance policy. It was *held* that the policy would be construed most favorably to the insured and

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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that the incontestability period would run from the date fixed by the application, and recovery was allowed.

. Appeal from the Circuit Court of McLean county; the Hon. COLSTON D. MYERS, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914. Rehearing denied December 2, 1914.

DEMANGE, GILLESPIE & DEMANGE, for appellant.

LIVINGSTON & BACH, for appellee.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

This is the third appeal from judgments entered in the trial court against appellant in actions by appellee to recover instalments due on a life insurance policy issued to John L. Arrowsmith. The present judgment is for the sum of \$975 and costs.

On the ninth day of September, 1907, John L. Arrowsmith made an application to the Provident Annuity Life Association of Illinois for a policy of insurance in the sum of \$5,000. The application was accepted and a policy for said amount was issued to him. Subsequently the Provident Association ceased to do business and the Old Colony Life Insurance Company, appellant in this case, reinsured the policy holders in the former Company and issued the insurance policy, on which this action is based, to John L. Arrowsmith on March 17, 1909. The policy issued by appellant contains this provision: "This insurance is granted in consideration of an application made to the Provident Annuity Life Association of Illinois, a copy of which is endorsed on or attached to and made a part hereof, and of the payment in advance of three and 79/100 dollars and of the payment thereafter of the same sum on or before the first day of each month in every year during the continuance of this policy."

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The application to the Provident Association contained this clause:

“7th. That self-destruction or death in violation of law, sane or insane, within two years from the date hereof, are risks not assumed by the Association in the contract, but in such case, the Association will return the amount of the premiums paid.”

The policy issued by appellant contained a provision:

“If within two years from date hereof, death results either from self-destruction, whether sane or insane, voluntary or involuntary, * * * the Company will repay premiums paid, with interest at five per cent. and shall not be otherwise liable.”

John L. Arrowsmith committed suicide on October 6, 1909. Appellant denied liability upon this policy on the ground that the suicide took place within two years from March 17, 1909, the date of appellant's policy. Appellee brought an action in assumpsit on said policy for a past due instalment and the trial court sustained a demurrer to appellee's declaration. On appeal to this court it was held that the demurrer should have been overruled and the cause remanded with directions to overrule the demurrer. *Arrowsmith v. Old Colony Life Ins. Co.*, 164 Ill. App. 44. Subsequently on a trial a judgment was recovered against appellant in that action, from which judgment another appeal was taken to this court, but we held: “The argument on this appeal is only a reargument of the questions heretofore determined by this court. It is unnecessary to repeat what was said in our former opinion. It has been repeatedly held by this court and the Supreme Court that questions determined by a former appeal become *res adjudicata* upon a second appeal.” *Arrowsmith v. Old Colony Life Ins. Co.*, 181 Ill. App. 163.

The only questions raised on this appeal are such as relate to the liability of appellant on said policy. The former judgments of this court are *res adjudicata* and conclusive as to all matters of defense which

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existed prior to the former suit and which might have been presented therein. The present appeal involves no issue which might not have been presented on the former appeals, and every question which might have been presented in the former actions and appeals is *res adjudicata*. *Louisville, N. A. & C. Ry. Co. v. Carson*, 169 Ill. 247; *Bennitt v. Wilmington Star Min. Co.*, 119 Ill. 9; *Marshall v. Grosse Clothing Co.*, 184 Ill. 421; *City of Chicago v. Partridge*, 248 Ill. 442.

However, as appellant claims to have discovered new facts in relation to the application and policy made to and issued by the Provident Association, which facts were set up in a special plea, to which a demurrer was sustained by the trial court, and which, it is claimed, precludes a recovery on this policy, under the holding of this court in its opinion rendered on the first appeal, we are disposed to consider appellant's contention as now made. In the opinion on the first appeal (164 Ill. App. 44) it is said:

“The question for determination is whether the provision of defendant's policy as to self-destruction shall relate to the date of defendant's policy or to the date of the policy of the Provident Life Insurance Company.

“Where an intent to make the application a part of the policy appears, the court, no matter what the phraseology may be, will read the application into the policy of insurance. * * *

“The application in this case having been made by the defendant a part of its policy, requires us to construe the policy in connection with the application and considering the application and the policy together the period of incontestability in case of suicide is rendered uncertain, and in view of the foregoing authorities the policy should receive liberal construction and one most favorable to the insured. By so doing the period of incontestability would run from the date of the policy of the Provident Life Insurance Company, *which will be considered of same date as the application*, where there is no other averment of its date, it being unnecessary to make such averment.”

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The plea in the case at bar avers that the policy issued by the Provident Association was in fact, dated November 1, 1907, and that the application provided that the policy to be issued by the Provident Association should be dated November 1, 1907. On the first appeal no such facts appeared and all parties assumed that the policy of the Provident Association bore the same date as the application, and this court assumed such to be the fact. Counsel for appellant now contend that because the policy of the Provident Association was, in fact, dated November 1, 1907, and because this court by using the language, "By so doing the period of incontestability would run *from the date of the policy of the Provident Life Insurance Company, which will be considered of same date as the application,*" the court should have overruled the demurrer to said plea. Presumably the original policy of the Provident Association was surrendered to appellant when appellant issued its policy, and that appellant was fully conversant with the fact that the Provident Association policy was dated November 1, 1907. It could have at least easily ascertained that fact, and its excuse averred in the plea for not presenting such fact in the first suit is that it was misled by the statements of opposing counsel and for that reason the doctrine of *res adjudicata* should not be applied. We know of no rule of law which holds that a litigant can avoid the doctrine of *res adjudicata* by pleading his own negligence in failing to discover facts which are practically wholly within his own means of ascertainment.

But the merits of the case could not be affected thereby in any event. Appellant's policy does not make the other *policy* a part thereof, nor does it refer to it in any way. Appellant's policy makes the *application* to the Provident Association a part of its policy, therefore said application and appellant's policy complete the contract between the appellant and the in-

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sured and they must be considered together. *Treat v. Merchants' Life Ass'n*, 198 Ill. 431. The application dated September 9, 1907, provided that self-destruction within two years from the date thereof was a risk not assumed by the Association. The policy issued by appellant dated March 17, 1909, provided that if within two years from the date thereof death should result from self-destruction, the Company would repay the premiums with five per cent. interest, but should not otherwise be liable. These provisions are inconsistent and the date of incontestability in case of suicide is rendered uncertain, and, as we held in our former opinion, the contract must receive that construction which is most favorable to the insured. The suicide was not committed within two years from the date of the application, and the liability of appellant cannot be avoided on the ground that it was committed within two years from the date of its policy.

The court did not err in sustaining the demurrer to the plea and the judgment will be affirmed.

Affirmed.

**Maywood Stock Farm Importing Company, Appellant,
v. Edward Huffman, Appellee.**

SALES, § 390*—*when averment of performance of conditions necessary where defendant alleges breach of warranty.* Where an action is brought on promissory notes and defendant pleads the general issue and special pleas, averring a total and partial failure of consideration, in that there was a breach of warranties by plaintiff, and plaintiff files a replication setting forth the warranties and averring that defendant failed to perform the conditions therein contained, to which defendant filed a rejoinder, a demurrer should be sustained to the rejoinder where it fails to aver a performance

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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of the conditions imposed on defendant under the terms of the warranties.

Appeal from the Circuit Court of Christian county; the Hon. JAMES C. McBRIDE, Judge, presiding. Heard in this court at the April term, 1914. Reversed and remanded with directions. Opinion filed October 16, 1914.

McQUIGG & DOWELL, for appellant.

GEORGE T. WALLACE, for appellee.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

Appellant brought suit in assumpsit against appellee to recover on two promissory notes, one for six hundred dollars and one for three hundred dollars. To the declaration appellee filed the plea of general issue and three special pleas, averring, in substance, a total and partial failure of consideration, in that the consideration of said notes was the purchase price of two stallions and that appellant, as a part of the contract, guaranteed that they should be satisfactory sure breeders, in which respect the guarantees failed.

To these special pleas appellant filed a replication to the effect that said guarantees were written guarantees, and the first is as follows:

“GUARANTEE.

“We have this day sold the imported Shire stallion March Blue Jacket No.....to Edward C. Huffman of Pana, Ill. and we guarantee the said stallion to be a satisfactory sure breeder, provided the said stallion keeps in as sound and healthy condition as he now is, and has proper care and exercise.

“If the said stallion should fail to be a satisfactory sure breeder with the above treatment we agree to take the said stallion back, and the said Edward C. Huffman agrees to accept another imported Shire stallion of equal value in his place, the said stallion March Blue Jacket No.....to be returned to us at Indian-

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apolis, Indiana, in as sound and healthy condition as he now is by May 15th, 1912.

(Signed) MAYWOOD STOCK FARM IMPTG. Co.,

By W. B. MOUNT, Treas.

Accepted, EDWARD C. HUFFMAN.

“Dated at Springfield, Ill., this 7th day of October, 1910.

“Hoof No. 35.”

The second is substantially the same:

“For and in consideration of the sum to be paid as aforesaid, the party of the first part guarantees the said stallion to be a sure breeder, provided the said stallion is kept in as sound and healthy condition as he now is, and has proper care and exercise. If the said stallion should fail to be a satisfactory breeder with the above treatment, the party of the first part agrees to take back said stallion, and the party of the second part agrees to accept another imported Percheron stallion of equal value, in his place. The said stallion to be selected by the party of the second part, and delivered to him at the Maywood Stock Farm Importing Company, near Indianapolis, Indiana. The said stallion Illiers No. 78625 to be delivered to the party of the first part at the Maywood Stock Farm Importing Company, near Indianapolis, Indiana, free of any and all charges to the party of the first part, in as sound and healthy condition as he now is, between January 1, 1913, and April 1, 1913.”

The replication further avers that appellee did not elect to return either of said stallions or to accept, in lieu of either of both of said stallions, other stallions of equal value within the time or at the places in said guaranties fixed and provided, by reason whereof said guaranties have long since expired and terminated.

To this replication appellee filed a rejoinder, averring that he advised appellant that said stallions were not satisfactory sure breeders, and that notwithstanding such advice and notice appellant did not take said stallions back, or offer to do so.

Appellant demurred to this rejoinder. The demurrer was overruled and appellant electing to stand by

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its demurrer, judgment was entered against it on said rejoinder.

The contracts referred to as guaranties are in fact warranties, and while formerly these words meant the same thing and are now sometimes used indiscriminately, yet to contracts as to title, quantity or quality of a thing sold, modern usage applies the term "warranty."

It is the contention of appellant that the rejoinder is bad because it does not aver that appellee returned or offered to return the stallions, while appellee insists that the warranty was for his benefit and that the contract did not require him to return the stallions in case of the breach of the warranty, but simply gave him an option so to do, and cites *Kemp v. Freeman*, 42 Ill. App. 500, as sustaining this view. The contracts in the case at bar are clearly distinguishable from that in the *Kemp* case. The first contract under consideration provided that if the stallion should fail to be a satisfactory sure breeder, "the party of the second part *agrees* to accept another imported Shire stallion of equal value in his place, the said stallion March Blue Jacket No.....to be returned to us at Indianapolis, Indiana, in as sound and healthy condition as he now is by May 15th, 1912." This contract was signed "Accepted, Edward C. Huffman."

The fact that appellant agreed to take back the stallion in such case does not destroy the obligation on the part of appellee to return it. His agreement to return it if it should not fulfil the warranty is just as binding as appellant's agreement to take it back and deliver another one in lieu thereof.

What we have said applies equally to the second contract of warranty. The rejoinder is bad in that it does not aver a performance of the conditions imposed upon appellee under the terms of the warranties.

The judgment is reversed and cause remanded with directions to sustain the demurrer to the rejoinder.

Reversed and remanded with directions.

**Florence Nolte, Appellee, v. Alvina Nolte et al.,
Appellants.**

1. HUSBAND AND WIFE, § 280*—*when evidence sufficient to justify verdict for plaintiff in action for alienation of husband's affections.* Where the evidence in an action by a wife against her husband's parents and brothers for the alienation of his affections, where the evidence shows that plaintiff had lived in happiness and harmony with her husband until their interference, the evidence justifies a verdict for plaintiff.

2. APPEAL AND ERROR, § 1466*—*when admission of improper evidence elicited by cross-examination not reversible error.* Even though there is a question as to the admissibility of evidence to corroborate a witness as to answers elicited on cross-examination, where the evidence is not harmful, its admission is not reversible error.

3. HUSBAND AND WIFE, § 280*—*when evidence admissible in action for alienation of husband's affections.* In an action by a wife against her husband's father, mother and brothers for alienation of her husband's affections, a notice, caused to be published by one of such brothers while the husband was ill, that the husband would not be responsible for the wife's debts and purporting to be signed by the husband is admissible to show such brother's connection with the matter at issue, and the credit to be given to such brother's explanation of his actions as to the publication is for the jury.

4. APPEAL AND ERROR, § 1526*—*when inexactness in phrasing definition not reversible error.* Even though an instruction defining malice given for plaintiff does not employ exact legal technical terms, where it is the same as one given in another case affirmed in the Appellate and Supreme Courts, and plaintiff's evidence, if true, clearly establishes malice, the giving of the instruction is not reversible error.

5. INSTRUCTIONS, § 81*—*when refusal to single out fact not error.* It is not error to refuse an instruction which singles out one of numerous facts and ignores the rest.

SCHOLFIELD, J., took no part in the consideration of this case.

Appeal from the Circuit Court of Coles county; the Hon. WILLIAM B. SCHOLFIELD, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914. *Certiorari* denied by Supreme Court (making opinion final).

Vause & Hughes, for appellants.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Nolte v. Nolte, 190 Ill. App. 469.

JAMES W. & EDWARD C. CRAIG and DONALD B. CRAIG,
for appellee.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

Florence Nolte, appellee, sued appellants, Alvina Nolte, Clarence Nolte, Arthur Nolte and also August Nolte, in an action on the case for damages for the alienation of the affections of her husband, Elmo Nolte. The jury found the appellants, Alvina, Clarence and Arthur Nolte, guilty and assessed appellee's damages at the sum of \$2,000. Judgment was rendered on the verdict. August Nolte was found not guilty. We deem it unnecessary to repeat the details of the pathetic story presented by the record in this case, the main facts only will be noticed here. Appellee, a young girl, in 1911 was teaching school in the country in Humbolt township near the city of Mattoon, Illinois, and about three-quarters of a mile from the home of August Nolte, who was a farmer residing in said township. The family of August Nolte consisted of his wife, Alvina, and his sons, Clarence, Arthur and Elmo. On September 30, 1911, appellee and Elmo were married. She continued to teach school until February 1, 1912. On the twelfth of February appellee and her husband moved onto a forty-acre farm rented from one C. F. Behrend, located between one-half and three-quarters of a mile from the home of August Nolte. The money appellee had earned teaching school was spent in buying furnishings for their new home. Clarence Nolte owned forty acres adjoining the farm they had rented, and Clarence and Elmo helped each other in the farming of their respective farms. The evidence shows, and it is wholly undisputed, that the young couple lived most happily together until after a baby was born, which occurred on January 6, 1913. In fact, the record shows that there never was at any time any discord of any kind between

appellee and her husband. There is no contention but that at all times appellee was hard working, dutiful and affectionate and the same may be said of her husband, Elmo Nolte. When the baby was born Elmo was delighted and very happy over the event. Appellee was very sick at this time and continued ill for about six weeks after the birth of the child. About a week after the birth of the child, Elmo was taken sick and his mother, Alvina Nolte, spent most of her time at Elmo's home taking care of him, with the result that Elmo was taken to the home of his father, August Nolte, as the evidence tends to show, through the procurement of his mother, Alvina, and his brother, Clarence. The incidents surrounding the removal of Elmo from his own home to that of his father it is unnecessary to repeat. The evidence clearly tends to show that through the efforts of the mother, Alvina, and the brothers, Clarence and Arthur, Elmo was persuaded and prevented from again returning to his wife and child, except for a short time hereinafter mentioned, and the jury were warranted in finding their verdict for appellee upon this issue. The evidence tended to show that the father, August Nolte, took no part in the matter and expressed his regret therefor, and the jury found him not guilty.

Appellee was left on this farm in the middle of winter, with a child barely two weeks old, in ill health, with no means of support, and, as the evidence tends to show, with insufficient provisions in the house, and on the advice of her physician went to the home of her mother at Mattoon with her baby. She left everything in the house as it was, and took only her clothes with her. Complaint is made of the admission in evidence on behalf of appellee of a certain notice. As above mentioned, when appellee left her home in the country to go to her mother's house at Mattoon, she left everything in and about the premises as they were, with the exception of her own clothing. There was an apparent contention made by appellants on the

trial that appellee abandoned her home and that she had refused to live with her husband. The evidence tended to show that after appellee had been at her mother's house for some time, through her efforts and those of her counsel, her husband, Elmo, agreed to go back and live with her and went back to her at her mother's house and they were again apparently perfectly happy. They went to Behrend and asked him if they could have the farm for another year, and, upon being told that they could, they were making preparations to return and live thereon. Barely two days elapsed before Arthur Nolte came to the house of appellee's mother in Mattoon, where Elmo and his wife were staying, and had a private whispered conversation with Elmo which resulted in Elmo again leaving appellee, since which time he has never returned. On cross-examination of appellee she was asked if Elmo did not offer to take her out home and live with her at that time, to which she replied that they had agreed that they would go. Then the following questions were asked her:

“Q. Now, when the time came to go, you wouldn't go, would you?

A. The time never came, Arthur came before that.

Q. But you had refused to go with him?

A. I had never refused to go with him.

Q. Now, after that meeting down there at the house you afterward sent out there and got all the furniture and hauled it in to town?

A. After the notice was served on me I did.

Q. What notice?

A. Mr. Behrend served a notice on me.

Q. Mr. Behrend served some kind of a notice and you went out there and got all the furniture and moved them into town?

A. Yes, sir.”

On redirect examination the notice was offered in evidence. The notice was dated March 11, 1913, addressed to appellee, signed by C. F. Behrend, notifying her to remove all her personal property from the

said dwelling house and that he would not be responsible in any manner for any possible damage that might occur to said property while located on said premises. Pursuant to this notice appellee removed the household furnishings to her mother's home. The plain inference this cross-examination sought to convey was, that appellee had refused to go out to her husband's home on the farm and had taken all the furniture and personal possessions therein to her mother's home at Mattoon and had abandoned her former home. The subject of the notice was necessarily brought out in response to questions propounded by counsel for appellants, and we think the notice itself was competent in corroboration of the truth of her answers given on her cross-examination. However, if it was error, it was not of such a harmful nature as should cause a reversal of the judgment.

The admission in evidence of certain newspaper notices is also complained of. Within two days after Elmo Nolte had been taken from his own home to that of his father, and at a time when, Arthur Nolte testified, he was very seriously ill and his life was despaired of, Arthur Nolte caused to be published in the newspapers at Mattoon the following notice:

“NOTICE. I will not be responsible for any debts contracted by my wife, Florence Nolte.

ELMO NOLTE.”

There was no error in the admission of this in evidence. It tended to show Arthur Nolte's connection with the matter at issue. The credit to be given to his explanation of his actions in regard to the publication of these notices was for the jury to determine.

Complaint is made of the giving of the third instruction for appellee on the ground that it does not contain the proper definition of “malice.” It seems to be conceded that this instruction was given in a case which was affirmed by the Appellate and Supreme Courts. We think that the criticism of the instruction is hypercritical, and even if it does not set out the

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definition of "malice" in exact legal technical terms, if the evidence offered on behalf of appellee is true, it clearly shows malice.

It is urged that the court erred in refusing appellant's second instruction which, in substance, instructed the jury that if they believed from the evidence that the defendant took Elmo Nolte home and cared for him while he was sick and not for the purpose of alienating his affections from appellee, that they should find defendant not guilty. This instruction was clearly erroneous, as the taking of Elmo to his father's home was only one of numerous facts and circumstances which tended to prove appellee's cause of action. .

There is no substantial error in the record and the judgment will be affirmed.

Affirmed.

MR. JUSTICE SCHOLFIELD took no part in the consideration of this case.

David A. Teegarden, Appellee, v. Supreme Tribe of Ben-Hur, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Vermilion county; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914.

Statement of the Case.

Action by David A. Teegarden against Supreme Tribe of Ben-Hur on a certificate of beneficial membership issued to Rosa A. Teegarden, deceased wife of plaintiff, in her lifetime, in the sum of five hundred dollars.

Teegarden v. Supreme Tribe of Ben-Hur, 190 Ill. App. 474.

The defense was that certain answers by the insured in the application for insurance were false. To this plaintiff filed replication that defendant's agent, of his own initiative, inserted false and different answers without the consent or direction of the insured, and that certain other answers were inserted by him without any question being asked and were the answers of the agent and not of insured.

The jury found the issues for the plaintiff and returned a verdict for five hundred dollars, on which verdict judgment was entered. From this judgment, defendant appeals.

Error is assigned on the failure of the court to direct judgment for defendant on the ground that the answers were warranties and the defendant is not estopped by its agent's fraud to set up their falsity.

CHARLES TROUP, for appellant.

THOMAS A. GRAHAM, for appellee.

MR. JUSTICE ELDBEDGE delivered the opinion of the court.

Abstract of the Decision.

1. INSURANCE, § 876*—*when verdict sustained where evidence as to falsity in answers to application conflicting.* In an action on a certificate of beneficial insurance, where the insurer claims that false answers were made in the application, the burden of proof is on it, and where the evidence is conflicting, the verdict for plaintiff will not be disturbed.

2. INSURANCE, § 752*—*when fraud of agent in answering questions in application for life insurance policy not a defense.* Where the insurer's agent, authorized by it to solicit insurance, take applications, fill in a part of them and collect first premiums, writes false answers in the application for a certificate of beneficial insurance in an action on the certificate the insurer is estopped to set up the falsity of the answers as a defense, the agent's knowledge being the knowledge of the insurer.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Hutton v. Forest City Life Ins. Co., 190 Ill. App. 476.

H. Ernest Hutton, Administrator, Appellee, v. Forest City Life Insurance Company, Appellant.

1. INSURANCE, § 598*—*when payment of premium to insurer presumed.* Where an insurer issues a policy of life insurance and sends it with a receipt for the whole premium to its agent, who delivers it to the insured, there is prima facie evidence that the premium was paid.

2. INSURANCE, § 593*—*when health of insured when premium paid not in issue.* In an action on a life insurance policy, where the pleas allege that insured was not in good health when the policy was issued, the fact of his being in bad health at the time the premium was paid is not put in issue.

3. INSURANCE, § 704*—*when finding of jury as to health of insured not disturbed.* When the jury finds adversely to the insurer, in an action on a life insurance policy, on the question as to whether the insured was in good health when the premium was paid, and this is not properly an issue, and there is no competent evidence in support of the defendant's contention, its verdict will not be disturbed.

Appeal from the Circuit Court of Vermillion county; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914.

ENGSTROM BROS. and W. R. JEWEL, JR., for appellant.

REARICK & MEEKS, for appellee.

MR. JUSTICE ELDBEDGE delivered the opinion of the court.

Appellant appeals from a judgment for \$1,112.50 rendered against it in favor of appellee in an action of assumpsit to recover on an insurance policy for \$1,000, issued by appellant to William Ray Ramsey, now deceased. Appellant filed four pleas to the declaration: The first plea being the general issue; the second, that said policy of insurance was without any good and valuable consideration; the third, that said policy was

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

obtained by fraud and circumvention in that at the time said *policy* was delivered to said Ramsey he, the said Ramsey, was not in good health and that said Ramsey by fraud and circumvention concealed that fact from appellant; the fourth, that said policy was obtained by fraud and circumvention in that at the time the *policy* was delivered to said Ramsey he was not in good health and that he and one O. K. Baldwin, agent for appellant, by fraud and circumvention concealed from the defendant that fact.

Ramsey, the insured, was a young man twenty-one years of age, residing at Sidell, Illinois, and while attending medical college at Chicago was taken ill and died of pneumonia April 20, 1911. On December 31, 1910, he made application for a policy on his life in the amount of \$1,000 to the Forest City Life Insurance Company of Rockford, Illinois, then a mutual and fraternal life insurance company incorporated under the laws of this State. The application was taken by one O. K. Baldwin, an agent of the Company, and forwarded to the home office. The amount of the premium was \$27.08. At the time the application was made Ramsey paid \$12.08 of this premium. After the application was made the Company procured a new charter as an old-line legal reserve Company and this charter was issued by the Secretary of State, March 24, 1911. The only difference in the name of the two companies was that in the latter Company the words "of Rockford, Illinois" are omitted. Between February 2, and 5, 1911, \$15, the balance of the premium due, was paid to said Baldwin by the insured. Appellant, without any further application, on March 27, 1911, issued the policy in question to said Ramsey. With this policy was sent to the agent Baldwin for delivery the official receipt of appellant for the first annual premium. The policy and receipt were mailed by Baldwin to the deceased in Chicago about April 1, 1911.

It is urged that as the appellant Company which

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issued the policy was not incorporated until March 24, 1911, that the premium which was paid to Baldwin before that time could not have been a premium paid to appellant Company because Baldwin could not have been an agent of a company which did not exist. This contention is without merit for the reason that it issued the policy in question and sent it with a receipt for the whole premium to Baldwin as its agent, who delivered it to Ramsey. This was prima facie evidence that the premium for the policy was paid, and there is nothing in the record to rebut this presumption. *Rose v. Mutual Life Ins. Co.*, 240 Ill. 45.

It is further contended that the evidence shows that the insured was sick at the time the premium was paid, and that under the following provision of the policy the policy became void: "I agree that my policy issued under this application shall not be valid, until the first premium therefor is paid to the Company or its authorized agent, and the receipt therefor countersigned during my lifetime, and while I am in good health."

In answer to this contention, the record discloses no competent evidence that Ramsey was not in good health when the premium was paid, and further there was no plea putting this fact in issue. The two special pleas, it will be observed, allege that the insured was not in good health at the time the *policy* was delivered. There was no provision in the policy that it should be void unless the insured was in good health when it was delivered and there is no rule of law to that effect. On the trial appellant abandoned the theory of these pleas and procured the court to instruct the jury that unless they believed from the evidence that the insured was in good health at the time the premium was paid, appellee could not recover. The jury found adversely to appellant on this improvised issue, and we can see no reason for disturbing its verdict.

The judgment will be affirmed.

Affirmed.

Convery v. Brotherhood of Railroad Trainmen, 190 Ill. App. 479.

John J. Convery, Appellee, v. Brotherhood of Railroad Trainmen, Appellant.

1. INSURANCE, § 717*—*provision in constitution and by-laws of benefit society construed.* A section in the constitution and by-laws of a benefit society merely providing what in certain instances will be considered a total disability of a member, *held* not to have the effect of excluding all liability for any other kind of permanent disability than that enumerated therein.

2. INSURANCE, § 740*—*rule in construing contract.* In construing beneficial insurance contracts, an ambiguity and uncertainty created when the benefit certificate is read in connection with the constitution and by-laws must be resolved in favor of the assured.

3. INSURANCE, § 856*—*when provision making decision of board of benefit society final invalid.* A provision in the constitution and by-laws of a benefit society which leaves it wholly within the discretion of the beneficiary board whether they will pay any disability claims, and provides that such provision may be pleaded in any suit brought on a benefit certificate and that no appeal shall be allowed from the decision of the board, *held* to be against public policy.

Appeal from the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914. *Certiorari* denied by Supreme Court (making opinion final).

GEORGE M. MORGAN, for appellant; E. JAY PINNEY, of counsel.

T. F. CONDON and ALBERT SALZENSTEIN, for appellee.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

In the language of counsel for appellant: "This is an appeal from a judgment of \$1,350.00 obtained by appellee against appellant in assumpsit for injury sustained by him to his right knee, which appellee claims and the evidence tends to prove resulted in a total and permanent disability from performing the duties of a railroad trainman."

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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Appellant on the 9th day of July, 1905, issued a beneficiary certificate to appellee in which it is declared that he "is entitled to all the rights, privileges and benefits of membership, and to participate in the beneficiary department Class C of said Brotherhood to the amount set forth in the constitution thereof, which amount, in the event of his total and permanent disability, shall be paid to him, or at his death shall be paid to his mother, if living," etc. The certificate also provides that it is issued on the condition that appellee shall comply with the constitution, by-laws, rules and regulations then in force, or which may thereafter be adopted by the said Brotherhood, and which are made a part thereof. To the declaration appellant filed the plea of general issue and three special pleas. To the special pleas a demurrer was sustained, and the only error presented to this court for consideration is the ruling of the trial court in sustaining the demurrer to the special pleas. These special pleas, in substance, aver that under the multitude of by-laws, rules, regulations and sections of the constitution the certificate does not mean what it says, and although appellee, in fact, became totally and permanently disabled and has paid all his assessments to said Brotherhood for nearly five years and performed all his obligations thereto, nevertheless he is not totally and permanently disabled and appellant is not liable to pay this certificate.

Appellant is a fraternal beneficiary association organized under the laws of this State, and the ostensible object of its organization appears to be: "To unite the railroad trainmen, to promote their general welfare and advance their interests, social, moral and intellectual, to protect their families by the exercise of a systematic benevolence very needful in a calling so hazardous as theirs." Section 54 of the constitution and by-laws provides for the establishment of a general fund, beneficiary fund, beneficiary reserve fund, protective fund and a convention fund. Section 58 provides that the beneficiary fund, in which all

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members, excepting nonbeneficiary members, shall participate, shall be disbursed exclusively in paying death, total and permanent disability and benevolent claims as described in sections 68, 69 and 70. This section further provides that the general secretary and treasurer shall, in order to maintain said fund, levy assessments monthly upon each beneficiary member in the following amounts, viz.: Upon each \$1,350 certificate, \$2; upon each \$1,000 certificate, \$1.50; and upon each \$500 certificate, 75 cents. Section 60 provides for three classes of beneficiary certificates, viz.: Class A, \$500, Class B, \$1,000 and Class C, \$1,350. Each certificate shall provide for the payment in accordance with the constitution of the full amount of such Class upon the death of the member insured therein or upon his becoming totally and permanently disabled within the meaning of Section 68. Section 68 is as follows:

“Sec. 68. Any beneficiary member in good standing who shall suffer the amputation or severance of an entire hand at or above the wrist joint, or who shall suffer the amputation or severance of an entire foot at or above the ankle joint, or who shall suffer the complete and permanent loss of sight of both eyes, shall be considered totally and permanently disabled and shall thereby be entitled to receive, upon furnishing sufficient and satisfactory proofs of such total and permanent disability, the full amount of his beneficiary certificate, but not otherwise.”

Section 70 provides that all claims of disability not coming within the provision of section 68 shall be held to be addressed to the systematic benevolence of the Brotherhood and shall in no case be made the basis of any legal liability on the part of the Brotherhood. Every such claim shall be referred to the beneficiary board, composed of the president, assistant president, and general secretary and treasurer, who shall prescribe the character and decide as to the sufficiency of the proofs to be furnished by the claimant, and if approved by said board, the claimant shall be paid an amount equal to the full amount of the certificate held by him,

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and such payment shall be considered a surrender and cancellation of such certificate, provided that the approval of said board shall be required as a condition precedent to the right of any claimant to benefits thereunder; and, further, that said section may be pleaded in bar of any suit or action at law, or in equity, to enforce the payment of any such claims, and that no appeal shall be allowed from the action of the board in any case.

It is insisted that section 68 defines what shall be a total and permanent disability and that it excludes all liability for any other kind of permanent disability than that enumerated therein, no matter how total and complete it may be. We do not think this section should receive any such construction. This section simply provides what in certain instances will be considered a total disability, thus, if a member shall suffer the amputation of an entire hand at or above the wrist joint, or of a foot at or above the ankle joint, or the complete loss of sight of both eyes, he will be considered as being totally and permanently disabled without further question, and upon furnishing sufficient and satisfactory proofs the full amount of his certificate will be paid, but not otherwise. The words "but not otherwise" refer to the furnishing of the proofs in such cases, and do not have the effect of excluding liability for all other forms of permanent injury. At least an ambiguity and uncertainty is created when the certificate is read in connection with these various sections of the constitution and by-laws, and it is a fundamental law of construction of insurance contracts in this State that all such uncertainties shall be resolved in favor of the assured.

In any event, however, appellee would have a right to recover under section 70. Section 58, above mentioned, provides that the Grand Lodge shall establish and maintain a fund to be known as a beneficiary fund in which all members, excepting nonbeneficiary mem-

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bers, shall participate, same to be disbursed exclusively, in paying death, total and permanent disability and benevolent claims as described in sections 68, 69 and 70. Section 70 provides that all claims for disability not coming within the provision of section 68 shall be held to be addressed to the systematic benevolence of the Brotherhood and every such claim shall be referred to the beneficiary board, and if approved by said board the claimant shall be paid an amount equal to the full amount of the certificate held by him. Appellee filed his claim in proper form under said section 70 with said board but the "systematic benevolence" of appellant was refused in this instance for "insufficient evidence." Section 58 declares that appellee shall participate in the beneficiary fund for permanent disability as described in section 70. Section 70 described such disabilities as all those not coming within the provision of section 68. It is insisted, however, that as section 70 leaves it wholly within the discretion of the beneficiary board whether they will pay any disability claims or not, and provides that said section may be pleaded in any suit brought on said certificate, and that no appeal shall be allowed from the action of said board and that said board having rejected the claim of appellee, he has no remedy. These provisions are clearly contrary to public policy. In the case of *Brotherhood of Railway Trainmen v. Greaser*, 108 Ill. App. 598, the court in passing upon this section states in its opinion: "The trend of judicial authority is so decidedly against the propriety of allowing one of the parties or its especial representatives, to be judge or arbitrator in its own case, that even a strained interpretation will be resorted to, if necessary to avoid such a result. If a different construction is fairly admissible it should be adopted." And again in the case of *Bond v. Brotherhood of Railroad Trainmen*, 165 Ill. App. 490, it was held: "It appears to us that it is plainly against the policy of the law to permit a beneficiary society to determine by

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its own officers whether or not conditions have arisen which entitled a beneficiary under one of its policies to benefits so as to prevent that beneficiary from applying to the court for relief in case of the neglect or refusal by the society to determine his rights or to pay his claim. The demurrers to the special pleas were, in our opinion, properly sustained.”

In the last case the court also held: “One of the objects of the certificate is plainly to insure benefits to the beneficiary in the event of his total and permanent disability and it is reasonable to assume that this is one of the reasons why the beneficiary takes out his certificate and pays his dues and assessments, but the provision of the constitution above referred to, deprives him, except in certain limited cases, of those benefits. That the interpretation sought to be given the certificate and constitution, by appellant, is unjust and unfair to the beneficiary, is obvious and, as it appears to us, cannot be sustained under the holdings of our courts of appellate jurisdiction.” To this we fully agree.

The judgment of the Circuit Court will be affirmed.

Affirmed.

B. A. Stewart, Appellee, v. Chicago, Bloomington & Decatur Railway Company, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914.

Statement of the Case.

Action by B. A. Stewart against the Chicago, Bloomington & Decatur Railway Company to recover the

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value of a horse killed by one of defendant's cars upon its right of way. The declaration charged that it was the duty of defendant to keep and maintain suitable and sufficient cattle guards to prevent animals from going upon the right of way, and that it negligently failed to keep and maintain such suitable and sufficient cattle guards, as provided by statute, at the point where plaintiff's horse passed over and upon the right of way. The jury returned a verdict in favor of plaintiff for two hundred and fifty dollars, and also allowed attorney's fees to the amount of twenty-five dollars. To reverse the judgment entered on the verdict, defendant appeals.

This case was before the Appellate Court on a former appeal in 180 Ill. App. 608.

LIVINGSTON & BACH, for appellant; SIGMUND LIVINGSTON, of counsel.

N. W. BRANDICAN, for appellee; WELTY, STERLING & WHITMORE, of counsel.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

1. RAILROADS, § 298*—*when evidence shows insufficient cattle guard.* In an action for stock killed on the right of way of a railway company, where it was charged that defendant did not maintain a suitable and sufficient cattle guard, evidence *held* to show the cattle guard was not such as contemplated by statute, where the only defense was that it was of standard construction and was of the same kind used by other railroads, and plaintiff's evidence showed that stock had passed over it on numerous occasions.

2. RAILROADS, § 298*—*sufficiency of cattle guards.* The statute's requirements with reference to sufficiency of cattle guards cannot be amended by general usage or custom among railroads.

3. APPEAL AND ERROR, § 1522*—*when return of two verdicts not prejudicial.* The fact that the jury rendered two verdicts, one for damages and the other fixing the amount of attorney's fees, *held* not prejudicial error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Bates v. Danville Street Ry. & Light Co., 190 Ill. App. 486.

Belle Bates, Appellee, v. Danville Street Railway & Light Company, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Vermillion county; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914.

Statement of the Case.

Action by Belle Bates against the Danville Street Railway & Light Company to recover for personal injuries sustained by plaintiff while riding as a passenger on one of defendant's cars. According to her testimony after she boarded the car and entered the vestibule, it was suddenly started with a jerk causing her to fall backwards and strike the small of her back against the controller box, causing a tearing sensation in her abdomen, resulting in a severe hemorrhage. The trial resulted in a verdict assessing plaintiff's damages at three hundred and fifty dollars. To reverse a judgment entered on the verdict, defendant appeals.

There were two jury trials of the case. At the first trial the jury returned a verdict for plaintiffs and the court set aside the verdict and granted a new trial.

H. M. STEELY and H. M. STEELY, JR., for appellant.

F. L. DRAPER, for appellee.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1413*—*when finding of facts by jury will be sustained.* Where the evidence was conflicting and two juries

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Kaufman v. Helmick et al., 190 Ill. App. 487.

have heard it and found the facts the same way, and there is evidence tending to sustain the findings, the judgment will not be reversed on the facts.

2. DAMAGES, § 244*—*when answer to improper question harmless.* In an action for personal injuries, where plaintiff was asked by her counsel if she was a married woman and had a family, and she answered that she had, before an objection could be interposed, and the answer was stricken out, *held* that though the question and answer were erroneous, their effect was not prejudicial in view of the small amount of the verdict.

3. DAMAGES, § 244*—*when conduct of plaintiff and remarks of counsel not reversible error.* In an action for personal injuries, where plaintiff during the closing arguments of her counsel burst out into a loud fit of crying and was guilty of other conduct tending to arouse the prejudice and passions of the jury, and counsel thereupon stated to the jury, "When that woman's soul dissolves in tears you know that she is telling the truth," which remark was objected to, and the court remarked, "Keep within the evidence," *held* that the conduct of plaintiff and the remarks of counsel did not, under the circumstances, constitute reversible error, as the size of the verdict did not indicate the jury were influenced thereby.

**Hattie F. Kaufman, Appellant, v. Adam Helmick and
Howard Helmick, Appellees.**

(Not to be reported in full.)

Appeal from the Circuit Court of DeWitt county; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the April term, 1914. Reversed and remanded. Opinion filed October 16, 1914.

Statement of the Case.

Action by Hattie F. Kaufman, Adam Helmick and Howard Helmick to recover on a promissory note purporting to have been executed by defendants, payable to the order of J. F. Newbanks for the principal sum of \$825. The note was assigned by Newbanks to plaintiff. Defendants filed the plea of general issue, veri-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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fied, and also a verified special plea averring that they did not make and deliver said note. A jury returned a verdict in favor of defendant. To reverse the judgment entered on the verdict, plaintiff appeals.

The evidence tended to show that Newbanks had signed as surety several notes executed by defendant and one G. W. Helmick, and that on said notes becoming due Newbanks induced defendants to sign the note sued on, payable to his order, so that the same might be negotiated and the proceeds used in the payment on the other notes on which he was surety; that Newbanks took the blank note to defendant Howard Helmick and that Howard took the note to his father, Adam Helmick, and returned it with the latter's name signed thereto and then signed his own name thereto in the presence of Newbanks and delivered it to Newbanks. Plaintiff's evidence also shows that Newbanks took the note for the purpose of negotiating it to one Stone, who called up Adam Helmick and asked him if the note was genuine, and that the latter told him that it was. Stone then sold the note to plaintiff. There was other evidence tending to show that Adam Helmick asked for an extension of time when the note became due. The evidence of defendants tended to show that neither of them signed the note nor ratified their signatures.

INGHAM & INGHAM and W. F. GRAY, for appellant.

JOHN FULLER and HERRICK & HERRICK, for appellees.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

BILLS AND NOTES, § 462*—*when instruction erroneous as ignoring the issue of ratification of the execution of note.* In an action on a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Kingan & Company, Ltd. v. Breen, 190 Ill. App. 489.

promissory note, where the execution thereof was denied by defendants and there was evidence tending to show that defendants had ratified the execution by acknowledging the same and by receiving the benefits from the proceeds thereof, *held* that instructions given for defendants which ignored the issue of ratification were clearly erroneous.

**Kingan & Company, Ltd., Appellant, v. P. J. Breen,
Appellee.**

(Not to be reported in full.)

Appeal from the Circuit Court of Edgar county; the Hon. WILLIAM B. SCHOLFIELD, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914.

Statement of the Case.

Action by Kingan & Company Ltd., against P. J. Breen to recover an account of \$116.57 and accrued interest.

From a judgment upon a verdict for defendant, plaintiff appeals.

STEWART W. KINCAID, for appellant.

DYAS & DYAS and O'HAIR & RHOADS, for appellee.

MR. JUSTICE ELDREDGE delivered the opinion of the court.

Abstract of the Decision.

PRINCIPAL AND AGENT, § 9*—*estoppel to deny authority to collect*. Where it appeared that defendant had been a regular customer, placing his orders through plaintiff's traveling salesman substan-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Corn Belt Bank v. Fisher, 190 Ill. App. 490.

tially every two weeks for four or five years, and during that period had purchased from plaintiff meats and lards to the amount of about \$10,000, and that during the last two years his purchases from plaintiff had amounted to about \$2,700 annually, and the salesman had collected substantially all of the money for plaintiff, *held* plaintiff, having recognized and ratified the acts of its salesman in collecting accounts for so many years and for so large amounts, was not in a position to deny the authority of his agency to collect the item in question, upon defendant's plea of payment.

SCHOLFIELD, J., took no part in the consideration of this case.

Corn Belt Bank, Defendant in Error, v. W. H. Fisher et al., Plaintiffs in Error.

1. MORTGAGES, § 504*—*requisite proof on bill taken pro confesso*. Where a decree of foreclosure and for a deficiency is entered *pro confesso* upon default, such decree if warranted by the averments of the bill is unassailable, there being no need of any evidence, as the finding of the court as to facts is conclusive.

2. MORTGAGES, § 504*—*effect of decree pro confesso*. Upon the prosecution of a writ of error to reverse a deficiency decree entered against subsequent grantees of mortgaged premises, where the averments in the bill of foreclosure were sufficient to support the decree and defendants permitted the cause to go by default so that a decree *pro confesso* was taken against them, *held* that they were concluded from questioning its correctness.

Error to the Circuit Court of McLean county; the Hon. COLSTIN D. MYERS, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed October 16, 1914.

DEMANGE, GILLESPIE & DEMANGE, WELTY, STERLING & WHITMORE and JAMES F. CLARK, for plaintiffs in error.

H. A. BAILEY, for defendant in error.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The defendant in error, the Corn Belt Bank, filed a bill in the Circuit Court of McLean county to foreclose a mortgage. On July 12, 1907, E. J. Robbins, a real estate dealer, held the record title to "all of block forty-two (42) in the First Addition to the Town of Normal, except fifty (50) feet adjoining the Chicago and St. Louis Railroad right of way * * * in McLean county, Illinois," and on that day, with Julia F. Robbins, his wife, executed the mortgage in question thereon to the Corn Belt Bank of Bloomington, to secure the payment of thirty-five hundred dollars, payable three years after date, with interest at six per cent. payable semiannually as per note and coupons. After the execution of the mortgage by Robbins to the Corn Belt Bank the property changed hands several times and finally the title landed in the plaintiff in error Grace P. Golden. In none of the deeds which were taken by the various grantees of this property was it provided that the grantee should assume and agree to pay the mortgage, but the deeds each time were made subject to the mortgage. Default was finally made in the payment of the interest and mortgage and a foreclosure had. All the subsequent grantees after the owner who executed the mortgage to the Corn Belt Bank were made party defendants.

The bill, after reciting the execution of the mortgage by E. J. Robbins and wife, averred that "thereafter the defendants Ida M. McGinnis, John W. Grapes, John H. Holmes, W. H. Fisher, Harvey E. Duncan, Herbert L. Hinton and Grace P. Golden respectively purchased and successfully became owners of the mortgaged premises, and that as a part of the consideration or purchase price paid by each of said defendants therefor each in turn assumed and agreed to pay said mortgage indebtedness; that the amount of said mortgage indebtedness was then and there deducted from the consideration or purchase price paid by each of said defendants for said premises."

A default was entered against all defendants and the cause was referred to the master who made his report. Evidence was introduced before the master tending to show that the grantees in various conveyances assumed and agreed to pay the mortgage, with the exception of the defendant John W. Grapes, who although defaulted was permitted to appear before the master and testify that the trade between him and his grantor McGinnis was only a trade of the equities and that he did not assume and agree to pay the incumbrance, and on this testimony no decree was taken against him personally for the payment of the indebtedness. The decree entered in the foreclosure proceeding ordered that the defendants, all of them who were the subsequent grantees excepting the defendant John W. Grapes, should pay this mortgage. A deficiency decree was prayed for, the property sold for less than the amount required to pay the mortgage and a deficiency decree was taken against all defendants excepting John W. Grapes.

This writ of error is prosecuted to reverse the deficiency decree against these subsequent grantees. The deeds were offered in evidence in the foreclosure proceeding and none of them show that the grantees assumed or agreed to pay the mortgage indebtedness, but the evidence offered before the master in chancery and contained in his report tends to show that this was the agreement, although the agreement is not contained in the deeds.

It is very evident from this record that if the parties had made a proper defense to this action no deficiency decree could have been entered against anybody excepting the original mortgagor, but under the practice in this State it is the rule that when the bill contains proper averments and a default is entered and a decree of *pro confesso* taken that it is not necessary to sustain the allegations by any proof, and that after that it is too late for the defendant to attack the decree. Such

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decree if warranted by the averments of the bill is unassailable. *Monarch Brewing Co. v. Wolford*, 179 Ill. 252. There need be no evidence. The finding of the court as to the facts is conclusive. *Gault v. Hoagland*, 25 Ill. 266; *Wing v. Cropper*, 35 Ill. 256; *Martin v. Hargardine*, 46 Ill. 322; *DeLeuw v. Neely*, 71 Ill. 473; *Hannas v. Hannas*, 110 Ill. 53; *North Chicago St. R. Co. v. Ackley*, 171 Ill. 100. The averments in the bill were sufficient to support the decree, and the defendants having permitted the case to go by default and a decree *pro confesso* to be taken against them, they are now concluded from questioning its correctness and the decree must be affirmed.

Affirmed.

Kittie B. Dice et al., Defendants in Error, v. Dale Wallace and James S. Catherwood, Plaintiffs in Error.

1. PRINCIPAL AND AGENT, § 35*—*right of agent to purchase principal's property for resale*. Where defendants acted as agents for a woman whose property they had under control, and in a final settlement of their affairs bought of her, without a complete disclosure of conditions to her advantage, a piece of real estate for \$2,200 and immediately sold it for \$5,000 to a purchaser with whom they were negotiating at the time for its sale at said price, *held* that they were rightly decreed to account to her for the \$5,000 with interest, and without any allowance of a commission for consummating the sale, as they occupied a fiduciary relation to the owner.

2. BROKERS, § 61*—*effect of bad faith*. A broker's bad faith will forfeit his right to commissions and profits in a transfer of real estate.

Error to the Circuit Court of Vermillion county; the Hon. E. R. E. KIMBROUGH, Judge, presiding. Heard in this court at the October term, 1913. Reversed and remanded with directions. Opinion filed October 16, 1914. Rehearing denied November 6, 1914. *Certiorari* denied by Supreme Court (making opinion final).

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Dice v. Wallace et al., 190 Ill. App. 493.

C. M. BRIGGS and JAY BRIGGS, for plaintiffs in error.

A. B. DENNIS, for defendants in error.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

This is a writ of error to the Circuit Court of Vermilion county to review a decree rendered in a suit between the defendants in error and the plaintiffs in error for an accounting. The case was heard upon the amended bill, answers, replications, master's report and exceptions thereto. Both parties filed objections and exceptions to said report and have filed errors and cross-errors in this court. Upon a hearing a decree was rendered against the plaintiffs in error on the accounting and they were ordered to pay the defendant in error Kittie B. Dice the sum of \$2,683.48. The decree also allowed the plaintiffs in error a commission of \$271.17, and did not allow the defendant in error, Kittie B. Dice any interest.

The evidence shows that on December 20, 1902, the defendant in error Kittie B. Dice conveyed by deed to the plaintiff in error Dale Wallace real estate described as follows: All of Dice's first addition to Hoopeston that remained unsold, together with lots, one, two, three and four of Dice's subdivision of part of section 14, township 23 north, range 12 west, which lies just west of and adjoining Dice's first addition to Hoopeston, to sell for and account to her for the proceeds after paying certain debts.

Plaintiffs in error were agents for Mrs. Dice. They had her property under their control and occupied a fiduciary relation with her and were bound to disclose to her everything to her advantage. They properly accounted to her, so far as disclosed for all the property sold except the last tract of five acres (block 2).

This, on a final settlement of their affairs, they bought of her without a complete disclosure of condi-

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tions for \$2,200, and immediately sold it for \$5,000. to a purchaser with whom they were negotiating at the time for its sale at \$5,000. The decree is right in requiring them to account to her for the \$5,000, but cross-errors by defendants in error are well assigned. Under the above facts no commission should be allowed to plaintiffs in error, and they should be charged with interest at five per cent. on \$2,954.65 from October 20, 1904, the day the lot was sold by plaintiffs in error for \$5,000.

The defense of laches cannot prevail under the pleading and evidence in this case. The decree will be reversed and remanded at the costs of plaintiffs in error with directions to enter a decree in conformity with this opinion.

Reversed and remanded with directions.

Thomas Sylvester, Appellant, v. Bloomington & Normal Railway and Light Company, Appellee.

(Not to be reported in full.)

Appeal from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the October term, 1913. Reversed and remanded. Opinion filed October 16, 1914.

Statement of the Case.

Action by Thomas Sylvester against the Bloomington & Normal Railway and Light Company for damages for the killing of a horse and the destruction of a wagon. The court instructed the jury to find the defendant not guilty. From a judgment entered upon a verdict for defendant, plaintiff appeals.

At about seven o'clock at night on October 24, 1911, plaintiff's servants were driving a team of horses belonging to plaintiff north on a public street upon which

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were defendant's tracks. When they came in sight of a signal light placed upon a pile of rock they were compelled to drive on defendant's car track. When they were just ready to turn onto the track the street car was from 800 to 1,000 feet south of them. The horses at that time were moving at the rate of from three to three and one-half miles per hour, and just as the horses were going on the track the street car was about 300 feet south of the rock pile. The team had gone far enough to go around the rock pile and the driver had turned them off the track when the rear end of the wagon was struck by the street car going north with such force as to demolish the wagon and break the back of one of the horses. The declaration alleged the plaintiff's servants were using all care and caution for the safety and care of the horses; charged the defendant with negligence in failing to equip the motor car with a good and sufficient headlight so that objects on the track in front of the car could be seen by its motorman. That the car was negligently running at a high rate of speed, to wit, thirty miles per hour, and that it failed to give reasonable or proper warning to plaintiff's servants of its approach.

HART & FLEMING, for appellant.

LIVINGSTON & BACH, for appellee; SIGMUND LIVINGSTON, of counsel.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

Abstract of the Decision.

1. TRIAL, § 195*—*when direction of verdict improper.* If there is any evidence which fairly tends to support the plaintiff's case it must be submitted to the jury, and the weight and credit to be given it is for the jury.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Dunham v. Slaughter et al., 190 Ill. App. 497.

2. STREET RAILROADS, § 100*—*when driving on car tracks not negligence per se.* For plaintiff's servants to drive on a track held not negligence *per se* under the circumstances shown by the evidence, and the question of whether or not they were guilty of contributory negligence in doing so was a question of fact to be determined by the jury.

3. STREET RAILROADS, § 86*—*care required in avoiding collision with animals and vehicle.* Where, in an action to recover for the killing of a horse and the destruction of a wagon struck by defendant's street car, it appeared that a team of horses were driven on the street railway tracks to avoid a rock pile, and that the car was coming from the rear at the rate of between thirty and thirty-five miles per hour, and that the headlight was but a 16-candle power reflector, in a rusted condition, by which an object could not be seen at a distance greater than twenty-five or thirty feet in front of the car, and that no bell was rung or whistle sounded, *held* the court erred in directing a verdict of not guilty.

**William S. Dunham, Appellee, v. Adylene D. Slaughter
and Kate D. Huston, Appellants.**

1. EQUITY, § 56*—*when improper ruling on demurrer waived.* Answering over constitutes a waiver of any error in overruling a demurrer to a bill in equity.

2. SPECIFIC PERFORMANCE, § 45*—*when bill will not lie to specifically enforce a contract relating to personal property.* Where one of three heirs to an estate sold his interest to his sisters for a certain sum to be paid, upon the admission of the will to probate, in certain bonds and a certain note which were in excess of the contract price, and the excess was to be repaid by a check from such heir, and the sisters refused to carry out the contract, *held* that a bill in equity for specific performance was not the proper remedy, as he had an adequate remedy at law for breach of contract.

Appeal from the Circuit Court of Logan county; the Hon. THOMAS M. HARRIS, Judge, presiding. Heard in this court at the October term, 1913. Reversed and remanded with directions. Opinion filed October 16, 1914. Rehearing denied November 6, 1914. *Certiorari* allowed by Supreme Court.

HUMPHREY & ANDERSON, for appellants.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.
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BEACH & TRAPP and BEVAN & BEVAN, for appellee.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

This is a bill filed by William S. Dunham, appellee, against Adyline D. Slaughter and her sister Kate D. Huston, appellants, for the specific performance of a contract. The parties are the children and only heirs at law of Martha E. Dunham, who died testate April 15, 1912, leaving an estate worth about \$106,000. By her will she bequeathed to Kate D. Huston \$16,000, and to Adyline D. Slaughter \$15,000, and after making some other small bequests directed that the residue of her estate be converted into money by her executors (her daughters) and divided equally amongst her children, the parties to this suit. The will was filed for probate and the son, William S. Dunham, the appellee, threatened to contest the will and its probate was postponed.

After some negotiations the parties made and entered into a contract in writing by which the son sold out all his interest in the estate to his sisters for the sum of \$25,000, to be paid to him within five days after the will should be admitted to probate, and his sisters appointed as executors, the said sum to be paid in certain United States bonds and a certain note, amounting in all to \$27,260, he to pay back \$2,260 in cash by check. The will was then probated, the son then made a deed conveying to his sisters all his interest in the estate of his mother, and tendered a check for \$2,330, being the amount agreed upon plus some accrued interest on the United States bonds and a note mentioned in the written agreement executed by the parties before the will was probated. The sisters declined and refused to carry out the contract and the bill was filed for specific performance.

A demurrer to the bill was overruled and the defendants answered over. They now insist that error

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was committed by the court in overruling the demurrer. By answering over they have waived the error, if any, in the overruling of the demurrer. *Hall v. Hall*, 125 Ill. 95; *McDole v. Kingsley*, 163 Ill. 437.

The answers, however, claim the same benefit and advantage they would have had by the demurrer and pray that the bill be dismissed for want of equity.

There is no reason apparent or alleged why a suit at law would not have given appellee an ample and complete remedy. By the agreement appellee was to get personal property only under its terms. Specific performance is not the proper remedy under such circumstances. *Anderson v. Olsen*, 188 Ill. 505; *Cohn v. Mitchell*, 115 Ill. 131; *Barton v. DeWolf*, 108 Ill. 197; *Pierce v. Plumb*, 74 Ill. 331; *Parker v. Garrison*, 61 Ill. 250; *Grape Creek Coal Co. v. Spellman*, 39 Ill. App. 630. The parties had a complete remedy at law.

The decree will be reversed and the cause remanded with directions to dismiss the bill for the reason that the proper remedy is at law.

Reversed and remanded with directions.

Charles F. Bryant, Defendant in Error, v. Charlotte M. Ayers et al., Plaintiffs in Error.

(Not to be reported in full.)

Error to the Circuit Court of DeWitt county; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the April term, 1914. Reversed with finding of fact. Opinion filed October 16, 1914. Rehearing denied December 2, 1914.

Statement of the Case.

Action by Charles F. Bryant against Charlotte M. Ayers, Cora Fleming, Thomas J. Danison and Arthur

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F. Miller to recover a commission alleged to have been earned in procuring a loan under a written contract. From a judgment in favor of plaintiff for \$175, the defendants, except Arthur F. Miller, bring error.

The declaration consisted of a special count under the contract and a common count. The written contract declared upon is as follows:

“Witness this agreement entered into by and between Cora Fleming, Thomas J. Danison, Charlotte M. Ayers and Arthur F. Miller, parties of the first part, and C. F. Bryant, the party of the second part, that party of the second part agrees to furnish the sum of twelve thousand dollars on August 19th, 1911, as a loan upon what is known as the Danison farm located in Nixon Township in Dewitt County, Illinois, at the rate of 5½ per cent. interest for a period of ten years with prepayment privileges of any multiple of hundreds at the end of the second year and to pay the agent C. F. Bryant a commission of \$240, or 2 per cent. commission.

“Said land to be sold at a Master in Chancery’s sale and said first parties to buy said land at a price at as high as \$210 per acre if necessary to purchase same. It is also agreed that in case the said parties of the first part fail to purchase said land that they are to pay all expenses of George J. Cable for appraising the land, also the expense of the examination of the abstract and also any necessary expenses incurred by the said C. F. Bryant. And if said loan is made all the said C. F. Bryant is to receive is the said \$240.

“It is also agreed that the expenses and reasonable compensation shall be paid Ira L. McKinnie for being here on day of sale and closing deal.”

Defendants desired a loan of \$12,000 to protect their interest in land to be sold at a master in chancery’s sale on August 19th following. The matter ran along until about the middle of August, when plaintiff notified Mr. Ayers, the husband of Charlotte M. Ayers, one of the defendants, that the company from which the loan was to be secured had turned down the application on the ground that the applicants did not have

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title to the property. Plaintiff and Ayers then went to Springfield to the office of the Franklin Life Insurance Company, from which the loan was to be secured, and had a conversation with Mr. Scott, its president, and Mr. McKinnie, a clerk in the loan department. Plaintiff and McKinnie testified that the situation of the title was explained to Ayers to the effect that he could not get title to the loan if he purchased it short of twenty days after the sale and until the sale was approved by the court, and the Insurance Company would hold the money. Ayers denied this and testified that Mr. Scott, the president of the Insurance Company, said that they would not hold the money for them until that time. Afterwards an arrangement was made by which defendants borrowed \$1,000 of the Dewitt County National Bank. Plaintiff in error claimed that he made the arrangement with the bank for the \$1,000, and Ayers claimed that he did. An arrangement was then made with the master in chancery, by which he agreed to accept \$1,000 as the amount of cash required to be paid on the day of the sale, instead of one-fourth of the purchase price, as provided by the decree, and on August 19th the land was bid in under the arrangements thus made.

HERRICK & HERRICK, for plaintiffs in error.

INGHAM & INGHAM and F. K. LEMON, for defendant in error.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

Abstract of the Decision.

1. **BROKERS, § 70***—*effect of declaring on special contract.* Where a loan agent declares on a special written contract for commission alleged to have been earned in procuring a loan, he cannot recover on the *quantum meruit*.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

O'Hern v. Illinois Central Electric Ry., 190 Ill. App. 502.

2. BROKERS, § 70*—*nature and form of action for compensation.* Where plaintiff by a written contract agreed to have money on hand for defendants to bid in their interest at a master's sale of certain real estate, and the money was not furnished on that day or any other day, and the contract was not in any way complied with, plaintiff is not in a position to recover compensation for a loan in a declaration upon a special contract.

Anna O'Hern, Appellee, v. Illinois Central Electric Railway, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Fulton county; the Hon. HARRY M. WAGGONER, Judge, presiding. Heard in this court at the October term, 1913. Affirmed on remittitur; otherwise reversed and remanded. Opinion filed October 16, 1914. Rehearing denied December 10, 1914.

Statement of the Case.

Action by Anna O'Hern against the Illinois Central Electric Railway to recover damages for personal injuries received by plaintiff while she was a passenger on one of defendant's cars. From a judgment on a verdict for fifteen hundred dollars in favor of plaintiff, defendant appeals.

CHIPERFIELD & CHIPERFIELD, for appellants.

O. J. BOYER and QUINN, QUINN & McGRATH, for appellee.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

O'Hern v. Illinois Central Electric Ry., 190 Ill. App. 502.

Abstract of the Decision.

1. CARRIERS, § 452*—*when declaration states cause of action.* Where the declaration averred that defendant was the owner and operator of an electric railroad from the city of Canton to the village of Norris in Fulton county, Illinois, on which it operated motor cars for the conveyance of passengers for reward; that plaintiff became a passenger thereon to be carried from Canton to Brereton and that it was the duty of defendant to use the highest degree of care to safely convey her on said car, yet the defendant, not regarding its duty, negligently ran said car against another car of defendant, whereby plaintiff, while in the exercise of due care, was injured, etc., *held* to state a good cause of action for damages for personal injuries.

2. DAMAGES, § 209*—*sufficiency of instruction.* In an action for personal injuries, an instruction authorizing a recovery for such sum or sums of money shown by the evidence that plaintiff had paid out or become liable for as reasonable charges for medical services, if any, rendered necessary by reason of such injuries, and to the effect that the jury should award her such sum as it believed from all the facts and circumstances in evidence would compensate her for all the damages sustained by her as the proximate result of her injuries, and also authorizing the jury to allow her all money she had paid out or become liable for, *held*, though technically erroneous in not limiting the jury on the question of damages, not to have been prejudicial to defendant, since instructions were given for defendant on the question of damages.

3. DAMAGES, § 115*—*when verdict excessive for temporary injuries.* In an action to recover damages for personal injuries received by a school teacher as a passenger on defendant's electric motor car through a collision with another car on defendant's railroad, where it appeared that she did not sustain any scratch or cut of any kind but only a bruise on her knee, which did not prevent her resumption of her occupation within two weeks, and that immediately after the accident she was able to ride in a standing position on a hand car to a boarding-house, and no permanent or serious injury was shown to be the proximate result of the accident, *held* that a verdict for fifteen hundred dollars was so excessive as to require a reduction to seven hundred dollars.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Cope v. Brentz et al., 190 Ill. App. 504.

**Mrs. N. L. Cope, Appellant, v. T. W. Brentz, Sheriff, and
Frank Cheney, Appellees.**

(Not to be reported in full.)

Appeal from the Circuit Court of Christian county; the Hon. JAMES C. McBRIDE, Judge, presiding. Heard in this court at the October term, 1913. Reversed and remanded. Opinion filed October 16, 1914.

Statement of the Case.

Action of replevin by Mrs. N. L. Cope against T. W. Brentz, sheriff of Christian county and Frank Cheney to recover the possession of property levied on under an execution. Plaintiff claimed that she by her agent was in possession under a chattel mortgage and bill of sale executed by the execution debtor. From a judgment in favor of the defendants, plaintiff appeals.

JOHN W. PREIHS and GEORGE T. WALLACE, for appellant.

ARTHUR ROE and W. B. McBRIDE, for appellees.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

Abstract of the Decision.

1. TRIAL, § 82*—*discretion of court in reopening cause for further evidence.* Where the court permitted defendants, after both parties had rested, to reopen the case and introduce in evidence a judgment upon which an execution was based and a levy made, it was *held* not erroneous, as being a matter wholly within the discretion of the court, the exercise of which is ordinarily not a subject for review.

2. INSTRUCTIONS, § 11*—*when erroneous.* An instruction directing a verdict and not requiring the jury to find the facts from

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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the evidence, and leaving it to the jury to say what is a valid mortgage, without telling what constitutes a valid mortgage, is erroneous.

3. INSTRUCTIONS, § 94*—*where witness testifies falsely to fact material to issues.* An instruction to the jury to the effect that if any witness has knowingly and wilfully testified falsely to any "material fact or allegation, etc.," is erroneous as it should have been any "fact material to the issues, etc."

4. INSTRUCTIONS, § 119*—*necessity of basing on evidence.* An instruction should be based on evidence with which to support it.

5. INSTRUCTIONS, § 114*—*necessity of confining to issues of pleadings.* Where there is no plea alleging that there was no consideration for a mortgage, it is erroneous for the court to instruct the jury upon such a question.

6. REPLEVIN, § 147*—*when instruction erroneous as ignoring defense.* In an action of replevin of property taken under an execution, an instruction that entirely ignores the defense that plaintiff was in possession of the property under a chattel mortgage is *held* erroneous.

7. REPLEVIN, § 26*—*sufficiency of instruction.* In an action of replevin to recover the possession of property taken under an execution, an instruction is *held* to fail to correctly state the law; that if possession is taken under an unacknowledged mortgage before possession is taken under the execution, possession will defeat the execution.

**E. R. Dickerson and C. A. Cantrall, Trustee, Appellees,
v. James A. Goodrich and Mary J. Brya, Appellants.**

1. WATERS AND WATER COURSES, § 4*—*duty of owners along streams.* The owners of land along a stream must use the same so as not to injure the land of others both as regards to surface and overflow waters.

2. WATERS AND WATER COURSES, § 15*—*when owners along stream not entitled to build or maintain levee.* Owners of land along a stream have no right to build or maintain a levee on their land where by doing so the current of the stream during high waters will be diverted across the land of others.

3. WATERS AND WATER COURSES, § 22*—*admissibility of evidence.* On bill to restrain owners of land along a stream from erecting and maintaining a levee on their land so as to divert the overflow waters

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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upon the lands of complainants, evidence with reference to an overflow at the time of a high water, and with reference to the effect of the levee upon the flow of the water after the levy was erected down to the time of the trial, *held* admissible.

Appeal from the Circuit Court of Christian county; the Hon. JAMES C. McBRIDE, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed October 16, 1914.

F. P. DRENNAN, for appellants.

PROVINE & PROVINE and W. B. McBRIDE, for appellees.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

This was a bill for injunction filed in the Circuit Court of Christian county by appellees to restrain appellant's from erecting and maintaining a levee on appellants' land and to tear down that portion of said levee already built. The bill alleges, in substance, that Dickerson is the owner of the northwest quarter ($\frac{1}{4}$) of the southeast quarter ($\frac{1}{4}$) and C. A. Cantrall as trustee, etc., is the owner of the east half ($\frac{1}{2}$) of the southwest quarter ($\frac{1}{4}$) of section twenty-five in township sixteen (16) north, range two (2) west of the third principal meridian, in Sangamon county, Illinois, lying north and west of, contiguous to the north fork of the Sangamon River, and which are bottom lands of great value; that Goodrich owns large tracts of land lying south of, adjacent to and near said river, among which are the south half ($\frac{1}{2}$) of the southeast quarter ($\frac{1}{4}$) and the northeast quarter ($\frac{1}{4}$) of the southeast quarter ($\frac{1}{4}$) of said section twenty-five (25) in the same township in Christian county, Illinois, which are also bottom lands, and that said Goodrich's lands lie on a lower level than the lands of appellee's, and that the lands of appellees are the dominant and the lands of said Goodrich the servient estate, with regard to the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

natural flow of the surface water; that the said stream in times of high water overflows its banks and spreads out over the surface of the lands of the said Goodrich, and is carried by depressions and channels southeasterly and thence southwesterly from said stream, emptying into a lake which empties into Mosquito Creek; and that said Goodrich and Byra to reclaim their lands propose to construct a levee of the height of two and one-half to fourteen feet on said Goodrich's land, beginning at the center of the east line of said section twenty-five, and running thence west, following the course of said stream eighty rods, to the half quarter section line, running north and south through the center of said section, and thence south, to connect with the old levee on said Goodrich's land, a distance of something over eighty rods, and that the building and maintaining of said levee will arrest or stop the flow of surface water in time of high water flowing down said stream, and preventing the same or the overflow water from flowing where, in a state of nature, they are wont and accustomed to flow, and will throw such surface water and overflow water back upon the lands of appellees, and will render such lands at such times unfit for cultivation, and will greatly injure appellees' lands and cause them irreparable damages, and also that the effect in course of time will be to cut a new channel for said stream across the lands of appellees, or some of them, etc.

The appellants by their answer admit that Goodrich is the owner of the lands above described, together with other lands lying adjoining the same, and admit that the above described lands of said Goodrich are overflow lands, but deny that they lie on a lower level than the lands of appellees, but aver that the lands of said Goodrich are the dominant and the lands of appellee the servient estate, in regard to the natural flow of surface water, and admit that they are about to build the levee above described, and have commenced to build and erect same, and have now completed the

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same from the center of the east line of said section, west a distance of about eighty rods, and thence south, a distance of about sixty rods, and intend to eventually extend the same to meet the old levee above mentioned; but aver that they have a right to so construct and maintain said levee, and that it will not damage appellees, as alleged in said bill, and will not cause them irreparable injury, etc.

The lands are bottom lands and subject to overflow from the north fork of the Sangamon River. The river swings in a southwesterly direction north of the lands of appellant Goodrich until it reaches the northwest corner of his land, when it proceeds practically directly south along the quarter section line between his land and appellee Dickerson's land, and then turns and proceeds west practically across the south side of appellee Dickerson's lands, and then turns and runs north along the west side of appellee Dickerson's land.

The evidence shows that the overflow waters of the river north of Goodrich's land originally followed a more or less well-marked channel across his land and emptied into a lake south thereof. During the winter of 1912 appellants built a levee across the north portion of Goodrich's land and partly down the west side thereof. This levee runs directly across what is known as the old channel and across all other depressions in said tract on the north side running south, thereby diverting the overflow waters of the river from Goodrich's land westward into the channel of the river. Appellant's claim that this caused the waters to break through the bank of the river at the northeast corner of Dickerson's land and flow southwesterly across his land forming a new channel.

Appellant concedes that there is no distinction between surface water, and overflow waters and running waters in regard in the right of dominant and servient owners, and that overflow waters of running streams are treated as surface waters. It is also conceded by appellants that the levee in flood time will cause the

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water to run higher on appellees' land, but insists that such fact will not damage them or render them unfit for cultivation.

Appellants insist that in the interest of good husbandry they have a right to maintain this levee and prevent surface water from spreading out over their lands, and cause it to run in the natural waterway where it is wont to flow when the river is not out of its banks, even though the levee might cause the overflow water to be deeper at times on the Dickerson and Cantrall lands than it would be were it not for such levee.

This is true providing the construction of the levee did not cause injury to the lands of others. The evidence in the case tends to show that during the high water in March, 1913, the current of the river was diverted across appellees' lands, and at the northeast corner of the Dickerson land, where the current first struck by reason of the diversion caused by the building of the levee in question, there was a large place washed out in his land and several large trees washed down, and after the flood went down there was a well-marked line of demarcation showing where the current had been washing out the corn stalks and weeds and in some places taking part of the earth with it, showing that there was a new current created which had never been in existence before. This high water was the first that occurred after appellants commenced the construction of the levee, and was not an extraordinary high water.

It is apparent from the evidence that the levee if permitted to stand would cut a new channel across the Dickerson forty acres and the Cantrall land west of same. The owners of land along a stream must use them so as not to injure the land of others both as regards to surface and overflow water. *Pinkstaff v. Steffy*, 216 Ill. 406.

Objections were made to the admission of evidence in regard to the overflow in the spring of 1913. This evidence was competent, and it was proper to prove

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the effect of the levee upon the flow of the water after the levee was erected down to the time of the trial. *Suehr v. Chicago Sanitary Dist.*, 242 Ill. 496. The decree was right and will be affirmed.

Affirmed.

John D. Wilson, Appellee, v. City of Mason City, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Mason county; the Hon. GUY R. WILLIAMS, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914.

Statement of the Case.

Action by John D. Wilson against the City of Mason City to recover damages for injuries to a building and the contents thereof, caused by the blowing over and falling upon the same of a fire alarm tower with an eight-hundred-pound bell on the top of it. The declaration, consisting of two counts, charged that defendant did not properly construct the tower and attach it to the ground so as to prevent it from falling during an ordinary windstorm and that the tower was built of light material, grossly out of proportion by making the height thereof so much greater than its width, etc. There was a verdict and judgment for plaintiff for \$300.07. To reverse the judgment, defendant appeals.

W. E. STONE, for appellant.

EDWARD WILSON and W. A. COVEY, for appellee.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

Hammond v. The Bloomington Canning Co., 190 Ill. App. 511.

Abstract of the Decision.

1. APPEAL AND ERROR, § 512*—*sufficiency of objections to questions asked of expert.* An objection that questions asked of an expert were irrelevant and immaterial does not save for review the question whether they were strictly hypothetical.

2. APPEAL AND ERROR, § 512*—*when sufficiency of hypothetical questions not saved for review.* The sufficiency of hypothetical questions cannot be considered on review where the missing element or inaccuracy is not pointed out in the objection or in the argument in the Appellate Court.

3. MUNICIPAL CORPORATIONS, § 1122*—*when city liable for fall of tower.* Where a city improperly constructs a fire alarm tower and the property of an adjoining owner is damaged by the falling thereof during a windstorm, the city is liable though the storm was unusual.

4. APPEAL AND ERROR, § 1421*—*effect of errors in decisions doing substantial justice.* Courts will not grant a new trial or reverse a judgment for error in admission or rejection of evidence or in the giving of improper instructions, if it appears from the entire record that justice has been done.

Reuben Hammond, Appellee, v. The Bloomington Canning Company, Appellant.

1. EVIDENCE, § 110*—*when testimony relating to X-ray photograph inadmissible.* In an action for personal injuries, permitting doctors, over objection, to testify what an X-ray photograph of plaintiff's person showed without producing the photograph, *held* error for the reason that the photograph was the best evidence.

2. EVIDENCE, § 436*—*sufficiency of hypothetical question.* In an action for personal injuries, a hypothetical question asked of doctors who had examined plaintiff, which commences: "Assuming that a man whose present condition is as you disclose the condition of plaintiff to be," etc., *held* improper, for the reason that the question should have in it all the facts on which the answer is based and that plaintiff claims his evidence proves his condition to have been.

3. DAMAGES, § 115*—*when excessive.* A judgment for forty-five hundred dollars for personal injuries *held* excessive in view of the work which plaintiff did after the injury.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Hammond v. The Bloomington Canning Co., 190 Ill. App. 511.

Appeal from the Circuit Court of McLean county; the Hon. COLSTIN D. MYERS, Judge, presiding. Heard in this court at the October term, 1913. Reversed and remanded. Opinion filed October 16, 1914.

BRACKEN & YOUNG and W. B. LEACH, for appellant;
BURT A. CROWE, of counsel.

DEMANGE, GILLESPIE & DEMANGE, for appellee.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

This is an action on the case by the appellee against the appellant to recover damages for personal injuries alleged to have been sustained by appellee because of the negligence of appellant.

A trial resulted in a verdict in favor of appellee and against appellant for forty-five hundred dollars. Judgment was entered on the verdict and appellant has appealed to this court.

Appellee was employed by appellant as a carpenter and general purpose man at appellant's canning factory in Leroy, Illinois. At the time of the accident complained of appellee was engaged in helping repair a broken drive shaft over a corn conveyor. The doing of this work required those who were engaged in it to get into the conveyor. Before beginning the work the conveyor was stopped and the men who had charge of operating the machinery were instructed not to start the conveyor while the men were repairing the drive shaft and until they were instructed to do so. While appellee was thus at work in helping repair the drive shaft and standing in the conveyor, the conveyor was suddenly started and appellee was thrown down and carried by the conveyor under a shaft nine inches above the top of the slats of the conveyor. He caught hold of the shaft and several slats of the conveyor passed under him, injuring him before the machinery was stopped.

Appellee was off work about four days, did not consult a doctor and then worked regularly for several weeks at his trade, a carpenter. An X-ray picture was taken of appellee's person and doctors were permitted, over objection of appellant, to testify what the X-ray showed without producing the photograph. This was error. The photograph was the best evidence as to what it showed, and appellant was entitled to see them in order that he might properly cross-examine the doctor as to what they showed and to offer testimony as to what they did not show.

A hypothetical question was asked several doctors who examined appellee. They were the doctors who had been employed by appellee. The question starts: "Assuming that a man whose present condition is as you disclose the condition of plaintiff to be," etc. The question should have in it all the facts on which the answer is based that appellee claims his evidence proves his condition to have been, so that the jury may know the facts on which the expert bases his answer. There may have been many things the doctor discovered that are a foundation for the answer made that are not known to the jury. There is a serious question in this case whether appellee was injured nearly as seriously as he now insists he was. The question also varies from the proven facts but not very materially. The question was improper and the objection to it should have been sustained. Appellee's judgment of forty-five hundred dollars is also excessive we think from the work he did after the injury.

In argument, reference was made to appellee as "a poor man," "a humble man." While we do not regard this, standing alone, as constituting reversible error, still the remarks were highly improper and prejudicial to appellant and should not have been made. For the errors indicated, the judgment will be reversed and the case remanded.

Reversed and remanded.

The People v. Obermeyer, 190 Ill. App. 514.

The People of the State of Illinois, Defendant in Error, v. John H. Obermeyer, Plaintiff in Error.

(Not to be reported in full.)

Error to the County Court of Morgan county; the Hon. EDWARD P. BROCKHOUSE, Judge, presiding. Heard in this court at the April term, 1914. Reversed and remanded. Opinion filed October 16, 1914.

Statement of the Case.

Prosecution by the People of the State of Illinois on an indictment against John H. Obermeyer for selling intoxicating liquor within anti-saloon territory. The indictment contained five counts and was certified to the County Court for trial. A trial was had by a jury and defendant was convicted. To reverse the judgment, defendant prosecutes a writ of error.

The evidence was that defendant was engaged in the drug business at Jacksonville, Illinois, and that he sold to a number of witnesses essence of ginger, the compound containing ninety-three per cent. alcohol and seven per cent. ginger. Witnesses for the People testified that they bought the compound as a liquor to be used as a beverage, while defendant testified that the compound was poisonous in its state as sold and unsafe to use as a beverage and that he sold it for medicinal purposes only.

WILLIAM N. HAIRGROVE, for plaintiff in error.

ROBERT TILTON and THOMAS F. SMITH, for defendant in error.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

McIlvrid v. Murphy et al., 190 Ill. App. 515.

Abstract of the Decision.

1. INTOXICATING LIQUORS, § 158*—*when instruction erroneous as ignoring element of good faith.* In the prosecution of a druggist for selling intoxicating liquor in anti-saloon territory, where the evidence showed that the alleged liquor was a compound containing a large percentage of alcohol, instructions given for the People ignoring the element of good faith on the part of defendant and therefore requiring a conviction though he sold the compound in good faith for medicinal purposes and not as a shift or device to evade the law, *held* erroneous.

2. INTOXICATING LIQUORS, § 158*—*when instruction erroneous as assuming facts.* In a prosecution of an indictment for selling intoxicating liquor in anti-saloon territory, an instruction is erroneous if it assumes the defendant sold such liquor in such territory.

3. CRIMINAL LAW, § 308*—*sufficiency of instruction.* In a criminal case, an instruction directing the jury to find the defendant guilty without requiring the jury to find from the evidence beyond a reasonable doubt is erroneous.

**William McIlvrid, Receiver, Plaintiff in Error, v.
Murphy and Walsh, Defendants in Error.**

(Not to be reported in full.)

Error to the Circuit Court of Tazewell county; the Hon. THEODORE N. GREEN, Judge, presiding. Heard in this court at the April term, 1914. Reversed and remanded. Opinion filed October 16, 1914.

Statement of the Case.

Action by William McIlvrid, receiver of Cockburn Company, a corporation, against Murphy & Walsh, a copartnership, on a contract against the defendants in error to recover the price of three aero pulverizers with combustion chambers alleged to have been sold and delivered by Cockburn Company to the defendants in error, and also to recover the market price of

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

McIlvrid v. Murphy et al., 190 Ill. App. 515.

some extras furnished defendants in error for said machines. The contract sued on is as follows:

“Rec’d.

May 20, 1912

Murphy & Walsh.

PEKIN, ILLINOIS, May 18, 1912.

Cockburn Co.

New York, N. Y.

Ship by freight.

Order No.

1166 D

Job 7305

“In acknowledging this order refer to Number and Date, and state when Shipment will be made.

“Direct to Murphy & Walsh.

Knox, Indiana.

3 Aero Pulverizers with Combustion Chambers Price \$3000.00 F. O. B. New York City, Terms 25% upon delivery. Balance or 75% sixty days after delivery. Two complete outfits to be shipped—ten days—third to be shipped within 30-days. These machines to be guaranteed to give results equal to fuel oil. Cost of operation to be 30% less than fuel oil, basing cost of coal at \$2.50 per ton F. O. B. Knox, Ind., and fuel oil two cents per gallon, F. O. B. Knox. Invoice must show NUMBER AND DATE OF THIS ORDER.

MURPHY & WALSH,
Per MILES MURPHY.

Accepted,

Cockburn Co.,

By W. A. Evans,

May 18, 1912.”

The declaration consisted of the common counts with a bill of particulars attached. The pleas were the general issue and a special plea with a bill of particulars attached. There was a verdict and judgment on the special plea for the defendants in error for \$591.99. To reverse the judgment, plaintiff prosecutes a writ of error.

GOODRICH, VINCENT & BRADLEY and THOMAS F. FERNS,
for plaintiff in error.

McIlvrid v. Murphy et al., 190 Ill. App. 515.

JESSE BLACK, JR., for defendants in error.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

Abstract of the Decision.

1. ASSUMPSIT, ACTION OF, § 88*—*admissibility of contract*. In an action based on the common counts to recover the purchase price of goods sold under an express contract, the contract is admissible in evidence.

2. SALES, § 309*—*when price or value may be recovered under common counts*. When the terms of a special contract of sale have been so far performed that nothing remains to be done, except the payment, the amount due may be recovered under the common counts. If, however, the contract remains executory, the plaintiff must declare specially on the contract.

3. SALES, § 325*—*burden of proof*. A clause in a contract of sale warranting machines sold to give certain results, *held* to be an independent covenant and therefore not a condition precedent, requiring the seller in an action for the purchase price to prove that the machines complied with the warranty before he could recover.

4. SALES, § 388*—*remedies for breach of warranty*. Where an independent covenant of warranty in a contract of sale is violated, the purchaser has a right of action against the seller for damages or he may recoup for damages.

5. SET-OFF AND COUNTERCLAIM, § 31*—*sufficiency of plea of set-off*. A special plea in order to constitute a plea of set-off entitling defendant to an affirmative judgment must allege that the amount due the defendant exceeds the amount of damages claimed by plaintiff, and offer to allow to plaintiff his damages and ask for judgment for excess.

6. SALES, § 330*—*when instructions erroneous*. In an action for the price of machines sold where there was a clause of warranty in the contract, instructions submitting to the jury whether the machines were accepted by defendants and stating that if they were not accepted to find the issues for defendants, *held* erroneous where the evidence conclusively shows that the machines were accepted, and it also appears that defendant must rely on the alleged breach of warrant and cannot rescind the contract, and that the plaintiff should be allowed a credit for the value of the machines whatever they were worth.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The Landon-Sharp Machine Co. v. Frankenberg, 190 Ill. App. 518.

**The Landon-Sharp Machine Company, Appellant, v.
Frederick G. Frankenberg et al., Appellees.**

1. PATENTS, § 10*—*validity of contract of assignment.* A contract to assign a patent *held* insufficient to warrant its enforcement as a continuing contract, though valid so far as carried out.

2. PATENTS, § 16*—*when bill does not show right to specific performance of contract to assign.* A bill for the specific performance of a contract to assign a patent, *held* not to show right to relief, when it appeared therefrom that complainants had abandoned the contract and that the patent was worthless.

Appeal from the Circuit Court of Adams county; the Hon. ALBERT AKERS, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914.

MILLER & SMITH, for appellant.

ZANE, MORSE & MCKINNEY, JOHN M. ZANE, E. BENTLEY HAMILTON and CLARENCE E. ELDRIDGE, for appellees.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

This is a bill for the specific performance of a contract to assign a patent. A general and special demurrer was filed by the defendants to the bill, and on a hearing the demurrer was sustained and the bill dismissed for want of equity.

The bill alleges that the Landon-Sharp Machine Company is a corporation duly organized under the laws of the State of Illinois, by Byron S. Landon and William A. Sharp and George H. Klump, prior to the eleventh day of March, 1900; that prior to the organization of the corporation said Landon, Sharp and Klump were salesmen in the city of Chicago, and Frankenberg, one of the defendants, was the inventor of certain improvements in tobacco stripping machines;

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

The Landon-Sharp Machine Co. v. Frankenberg, 190 Ill. App. 518.

that Frankenberg was wholly without means to develop his inventions or even to make application for patents thereon, and that he agreed with Landon, Sharp and Klump that if they would supply funds to secure patents and to build an experimental machine he would assign the patents to them. An application for a patent was filed and the work of constructing a machine was begun; but the agreement between the individuals was shortly thereafter superseded by the contract with the corporation now to be set forth.

On or about March 17, 1900, a written contract was duly executed between Frankenberg and the Landon-Sharp Machine Company by which the latter agreed to pay all expenses of applying for and securing patents on inventions relating to tobacco stripping machines then or thereafter made by Frankenberg; also to supply the necessary capital for the building and testing of an experimental machine or machines, including the expense attending the making of working drawings, material, labor, etc.; also to pay to the said Frankenberg the sum of \$10 per week for such time as he might devote to the said invention during the existence of the agreement; and also in the event that a successful commercial tobacco stripping machine should be produced by the joint efforts of the contracting parties, to issue to Frankenberg one-fourth of the capital stock of the Landon-Sharp Machine Company. Frankenberg agreed in the same contract to prepare working drawings for the construction of machines in accordance with his inventions then made or thereafter to be made, and from time to time to supervise and to assist in the work of constructing the machines and in the experimental operation thereof, and to assign to the Landon-Sharp Machine Company all inventions pertaining to tobacco stripping machines which had theretofore been made by him or which should be made by him during the existence of the agreement, together with all patents issued or to be issued for such inventions. It was also agreed that the contract

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should remain in force until the Landon-Sharp Machine Company should demonstrate to its satisfaction whether or not a commercial tobacco stripping machine could be built in accordance with Frankenberg's inventions. The bill also alleges the loss of many of the papers belonging to the Landon-Sharp Machine Company, including the contract with Frankenberg; alleges in detail the complete fulfilment by the Landon-Sharp Machine Company of the terms of the contract, and that sums were advanced to Frankenberg in excess of the amount required by the contract; that every effort was made to develop a commercial machine, including the construction of five successive experimental machines requiring the expenditure of more than \$50,000 by the Landon-Sharp Machine Company; that after six years of futile experiments the Landon-Sharp Machine Company became convinced that no successful commercial machine could be constructed along the lines then being followed by Frankenberg and thereupon terminated the contract; that the contract remained in force during the whole of the time from March 17, 1900, to some time in the year 1906, and that payments were made to Frankenberg on such contract until 1906.

The bill also alleges that Frankenberg on the seventeenth day of March, 1900, executed an assignment to the Landon-Sharp Machine Company of a certain application then pending; that subsequently thereto four patents were applied for and issued as follows:

“No. 677,407, July 2, 1901, Tobacco Stripping Machine.

No. 715,651, Dec. 9, 1902, Tobacco Stripping Machine.

No. 715,652, Dec. 9, 1902, Tobacco Stripping Machine.

No. 776,018, Nov. 29, 1904. Tobacco Stripping Machine.”

That all of said letters patent, with the exception of No. 677,407, issued on July 2, 1901, were duly assigned by Frankenberg to the Company; that until the fifteenth day of October, 1912, the Landon-Sharp Ma-

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chine Company supposed and believed that this patent 677,407 had also been assigned to it in the same manner; that all the expense of obtaining this patent was paid by the Company; that the patent was, when issued, delivered to the Company and still remains in its possession; that the records of the patent attorney employed to procure the patent show that he rendered to the Landon-Sharp Machine Company a bill for the drawing and recording of an assignment of the said patent or of the application therefor; and finally that the defendant Frankenberg has heretofore admitted in the presence of a witness that it was his intention to assign all of the patents, and that he believed he had assigned this patent No. 677,407, but no record of such assignment can now be found.

The bill also alleges a prompt notice and demand upon Frankenberg, to wit, on the sixteenth day of October, 1912, and the refusal of Frankenberg to assign the patent to the Company; that the appellee Frankenberg is employed by the appellee Automatic Stemmer Company, which is engaged, or is about to engage, in the business of manufacturing tobacco stemming machinery, and that upon Frankenberg's refusal to execute the assignment the appellant notified the said Automatic Stemmer Company of the facts hereinbefore set forth and of the right of the appellant to have an assignment of the patent; that verbal notice was given on the sixteenth day of October, 1912, to the secretary of the Automatic Stemmer Company and that formal written notice to the same effect was served on the Automatic Stemmer Company on October 17, 1912, but notwithstanding such notice, and having full knowledge of appellant's rights in the premises, the appellee Automatic Stemmer Company caused to be executed on the eighteenth day of October, 1912, and subsequently caused to be recorded in the United States Patent Office at Washington, an assignment by Frankenberg to the Automatic Stemmer Company of all his rights, title and interest in and to the said pat-

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ent, which assignment recites that said Frankenberg is the sole owner of said patent; and that by virtue of such assignment the Automatic Stemmer Company is asserting title to said patent, to the great and irreparable injury of the appellant.

The bill prays specific performance by Frankenberg of his contract to assign United States letters patent No. 677,407, and that the Automatic Stemmer Company be required to join in such assignment, for an injunction restraining the assignment of the said patent to others, and for general relief.

It is argued that the contract is void for want of mutuality. While it cannot be enforced as to continuing the contract, it is we think, a valid contract, so far as carried out, but other questions are decisive of the case. The contract was abandoned by complainants, appellants, in 1906, so they allege in their bill. The contract having been abandoned by them they cannot enforce it. *Cuppy v. Allen*, 176 Ill. 162; *Cheney v. Ricks*, 168 Ill. 533. The allegations of the bill show that the patent is worthless and therefore an assignment will not be ordered. *Johnson v. Steffens*, 54 Ill. App. 193; *Dunnon v. Thomsen*, 58 Ill. App. 390.

Complainants having abandoned the contract and declined to promote the venture should not be permitted to tie up the defendants from the use of something they do not desire and refuse to use. They should have continued their efforts to make the patents a commercial success. Having abandoned it they may not after six years be heard to say it should be resurrected. The decree was right and is affirmed.

Affirmed.

Sarah O'Connell, Plaintiff in Error, v. Chris Bunn et al., Defendants in Error.

1. INTOXICATING LIQUORS, § 249*—*when instruction improper*. In a suit by a widow for the loss of her means of support by reason of the sale of intoxicating liquors to her minor son, the giving of an instruction that under the laws of this State the conducting of a legally licensed dramshop is in all respects legitimate, *held* error.

2. INTOXICATING LIQUORS, § 249*—*when instruction erroneous*. In a suit by a widow for the loss of support resulting from the sale of intoxicating liquor to her minor son, an instruction telling the jury that if they believe from the evidence that plaintiff during the time covered by the declaration received a sufficient sum of money from any of her other children which together with that received from her son was sufficient to and did support her in manner suitable to her condition in life they should find defendants not guilty, *held* erroneous as not properly stating the law.

3. INTOXICATING LIQUORS, § 249*—*when instruction erroneous*. In a suit by a widow for the loss of her means of support on account of the sale of liquor to her minor son, an instruction to the effect that if the plaintiff knowingly permitted the son to collect his wages himself and use the same as he saw fit she cannot recover for the wages spent by her son by reason of intoxication, etc., *held* erroneous as falsely assuming that plaintiff was attempting to recover her son's wages.

Error to the Circuit Court of Macoupin county; the Hon. ROBERT B. SHIRLEY, Judge, presiding. Heard in this court at the April term, 1914. Reversed and remanded. Opinion filed October 16, 1914.

J. B. SEAROY and F. M. GUINN, for plaintiff in error.

EDWARD C. KNOTTS, W. H. NELMS and F. P. DRENNAN, for defendants in error.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

This was an action on the case under the dramshop law, brought by plaintiff in error against defendants

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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in error, to recover damages for an alleged injury to her means of support by reason of the intoxication of her minor son, William O'Connell, caused by the sale to him of intoxicating liquors by the defendants in error. The case was tried by a jury. The jury returned a verdict finding the defendants not guilty. A motion for a new trial was made and overruled and judgment entered on the verdict for the defendants, to reverse which this writ of error is prosecuted.

The declaration charges that plaintiff is a widow and is the mother of one William O'Connell, a minor son of seventeen years, with whom she resides, and on whom she has been dependent for a support and maintenance; avers that on to wit, the first day of February, 1909, the said defendants sold and gave intoxicating liquors to the said William O'Connell which caused him to become intoxicated, and that on divers other days and times after that date the said defendants continued to sell and give to him intoxicating liquors which caused him to become habitually intoxicated from said first day of December, 1911, until the bringing of this suit; that whilst so intoxicated, and in consequence thereof, he spent and squandered his money and earnings for intoxicating liquors, bought of and from said defendants, and failed and neglected in consequence of his said intoxication to turn over his earnings to plaintiff which was his duty to do, and as he would have done except for said intoxication; and that as a result plaintiff was injured and damaged in her means of support.

The evidence showed that said William O'Connell worked in the mines and generally brought part of his pay home and gave it to plaintiff in error, and that plaintiff in error had another son and a daughter who also gave her a part of their wages; soon after said William O'Connell began to work in the mines he would get intoxicated nearly every pay day, and would spend all his money; that he was a customer of the saloon of the defendants, and that his habits of

intoxication were well known. The evidence also showed that on December 24, 1912, he became intoxicated and got into a fight and received personal injuries which laid him up about two or three weeks. On December 24, 1908, the plaintiff in error gave the Superior Coal Company an order in writing to pay her sons Thomas and William O'Connell all wages earned by them from such company while in its employ.

Among the instructions given for the defendants were the following:

“No. 2. The court instructs the jury that you should not permit yourselves to be influenced in the slightest degree in favor of the plaintiff in this case or against the defendants, because of the fact that the defendants were engaged in the saloon or dramshop business in Macoupin county, Illinois, if you believe from the evidence they were so engaged; that under the law of this State the conducting of a legally licensed dramshop is in all respects legitimate, and the defendants and each of them are entitled to the same fair unbiased consideration at your hands as if they were engaged in any other business.”

“No. 8. The court instructs the jury that even though the jury may believe from a preponderance of the evidence that the defendants sold or gave intoxicating liquors to William O'Connell, and that the said intoxicating liquors materially assisted in causing said William O'Connell to be and become habitually intoxicated, and that by reason of said habitual intoxication said William O'Connell wasted and squandered his wages and lost time from his work, yet if the jury further believe from the evidence that the plaintiff during the time by the declaration covered, received a sufficient sum of money from any of her other children which, together with what she did receive from her son, William O'Connell, was sufficient to and did support and maintain the plaintiff in a manner suitable to her condition in life, the jury will find the defendants not guilty.”

“No. 13. The court instructs the jury that even though the jury may believe from a preponderance

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of the evidence that the plaintiff during the period covered by the declaration was entitled to the wages of her son, William O'Connell; yet if the jury further believe from the evidence that the plaintiff knowingly permitted her said son to collect his wages himself, and use such wages as he saw fit, the same as an adult, then and in that event the plaintiff cannot recover for the wages so collected by her authority, and spent by her son by reason of intoxication, habitual or otherwise, if such is shown by the evidence."

Instruction No. 2 should not have been given: "That under the law of this State the conducting of a legally licensed dramshop is in all respects legitimate, is a matter which the jury had no right to take into consideration in their deliberation. The business is a recognized subject for regulations by the police power of the State. *Horan v. Cooke Brewing Co.*, 178 Ill. App. 653. The eighth instruction informs the jury that if they believe from the evidence that the plaintiff during the time covered by the declaration received a sufficient sum of money from any of her other children which, together with what she received from her son, William O'Connell, was sufficient to and did support her in manner suitable to her condition in life, they should find the defendants not guilty. The test is, was the plaintiff injured in her means of support by reason of sales of liquor to her minor son? The fact that she received support from her other children would make no difference. She was entitled to the support of her minor son, and anything that diminished it affected her means of support. The thirteenth instruction is faulty in that it overlooks the issue. The cause of action in the declaration is that the defendants sold intoxicating liquors to her minor son and caused him to become habitually intoxicated and that by reason thereof he lost time and squandered his money and that plaintiff was deprived of his earnings. The instruction falsely assumes that plaintiff is attempting to recover his wages. Complaint is also made of the

City of Leroy v. Guthrie, 190 Ill. App. 527.

refusing of certain instructions for the plaintiff. While we think they should have been given they were covered by other instructions given for her. For the errors indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

**City of Leroy, Plaintiff in Error, v. P. A. Guthrie,
County Clerk, Defendant in Error.**

1. CLERKS OF COURTS, § 18*—*fees of clerk of County Court in eminent domain proceeding by city for local improvements.* Under section 18 of chapter 53, Hurd's R. S. 1911, relating to Fees and salaries (J. & A. ¶ 5619), the clerk of the County Court is not authorized in special assessment cases to tax \$20 as costs for the exercise of the right of eminent domain and \$10 as costs for each lot when the local improvement requires the exercise of the right of eminent domain by the municipality.

2. MUNICIPAL CORPORATIONS, § 455*—*costs in eminent domain proceedings under Local Improvement Act.* In eminent domain proceedings by a city under the Local Improvement Act of 1897 (J. & A. ¶¶ 1388 *et seq.*), the statutory provisions relating to costs in proceedings under the Eminent Domain Act (J. & A. ¶¶ 5152 *et seq.*) are not applicable.

Error to the Circuit Court of McLean county; the Hon. HOMER W. HALL, Judge, presiding. Heard in this court at the April term, 1914. Reversed and remanded with directions. Opinion filed October 16, 1914.

LESLIE J. OWEN and STONE, OGLEVEE & FRANKLIN, for plaintiff in error.

MILES K. YOUNG, for defendant in error; W. B. LEACH, of counsel.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

City of Leroy v. Guthrie, 190 Ill. App. 527.

The plaintiff in error, the City of Leroy, filed in the County Court of McLean county its petition under the Act concerning Local Improvements in force July 1, 1897, and the amendments thereto, (J. & A. ¶¶ 1388 *et seq.*) for the appointment of two commissioners to act with the president of the Board of Local Improvements in fixing a just compensation for private property to be taken for a sewer system for said petitioner and to assess the benefits resulting therefrom under said Local Improvement Act. The commissioners were appointed and made report as provided by said act. Said improvement contemplated the construction of said sewer system across thirty-four tracks of land of individuals.

A jury was impaneled and returned thirty-four verdicts fixing the just compensation to be paid for the lands taken and damages for the lands not taken in each instance at the same sum which had been determined upon by the commissioners in their report, the total of which was \$72, and upon the return of said verdicts the court entered an order directing that the sum due for the lands taken or damaged be paid by petitioner, and upon proof of said payment that the petitioner was entitled to take possession of said property for the purpose of constructing said improvement, and thereafter the special assessment proceeding went forward in regular form to final judgment and all services were performed in connection therewith by the clerk as provided by law, and the court ordered that the petitioner pay the costs of said proceeding.

Costs in said proceeding were taxed by the clerk in the following manner:

“For services special assessment.....	\$ 10.00
For issuing warrant, 607 descriptions at 10¢	
each	60.70
For eminent domain.....	20.00
For each tract in eminent domain, extra 34	
tracts at \$10 each.....	340.00

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Fees of Jas. Reeder, sheriff, serving and re- turning summons.....	99.15
Fees of LeRoy Journal, printer.....	32.10
Fees of George W. Payne, commissioner...	50.00
Fees of Harry Lamant, commissioner.....	50.00
Fees of W. R. Flint, guardian ad litem....	5.00
	<hr/>
	\$666.95''

The petitioner made a motion to retax the costs, objecting to the following items of costs as taxed by the clerk in said proceeding, to wit:

"Eminent domain.....	\$20.00
Each tract in eminent domain extra 34 de- scriptions at \$10 each.....	340.00''

The motion was denied.

The question involved in this case is whether or not the clerk of the County Court is authorized by that paragraph of section 18 of chapter 53 of the Statute (J. & A. ¶ 5619), which concerns services in special assessment cases, to tax \$20 as costs for the exercise of the right of eminent domain and \$10 as costs for each lot when the local improvement requires the exercise of the right of eminent domain by the municipality.

The Local Improvement Act provides for the improvement as therein provided, and section 12 (Hurd's R. S. 1911, sec. 518, p. 407, J. & A. ¶ 1399) provides if the ordinance for the improvement requires the taking or damaging of property the proceeding for making compensation shall be as described in sections 13 to 33.

It was said in *Rieker v. City of Danville*, 204 Ill. 192, that the Eminent Domain Act cannot apply to the Local Improvement Act; they are entirely different classes of proceedings. They being "wholly different" the Eminent Domain Cost Act cannot apply to the Local Improvement Act. The county clerk having taxed \$20 for costs on the proceeding and \$10 costs for each tract or lot, the court should have allowed the motion

Bunn v. Smith, 190 Ill. App. 530.

to retax and set aside the said items of \$20 and the \$10 on each tract or lot, amounting to \$360. The order of the County Court is reversed and the case remanded to the County Court with directions to retax the costs by striking therefrom said items.

Reversed and remanded with directions.

Harry C. Bunn, Appellant, v. Nettie B. Smith, Appellee.

(Not to be reported in full.)

Appeal from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914.

Statement of the Case.

Action by Harry C. Bunn against Nettie B. Smith to recover the sum of \$1,800 as a real estate broker's commission. The case was tried by a jury and at the close of plaintiff's testimony the court directed a verdict for defendant. To reverse a judgment entered on the verdict, plaintiff appeals.

Defendant and her two brothers owned a store building occupied by a certain company as a tenant. Plaintiff testified that he called defendant by telephone and conversed with her as follows: "I told her I had a customer who would pay \$87,000 for the building; she said she couldn't accept it; she said her brother had always told her that it was worth \$90,000, and they ought to have it, she referred to Dudley, and she also said she wouldn't feel right to take a less amount. I said if I get a customer *who will* give you \$90,000 will you sell? And she said she would, and I said all right." After this conversation plaintiff testified that he had a talk with the manager of the store and pro-

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cured the name of Mr. Smith, the vice-president of the company, and wrote to him; that Mr. Smith later called upon him and that he (Mr. Smith) finally made the remark: "I expect we will have to buy this building, you get Miss Smith (the defendant) to come to the store." Plaintiff further testified that he then went to look for defendant and that Mr. Smith went to the store; that after the latter reached the store the manager called in the defendant and very soon thereafter he (plaintiff) entered the store and spoke to defendant and said: "I have been looking and telephoning for you," and that she said: "I can sell to these people as well as you can. I didn't tell you to sell my building;" that he said: "Don't you remember my offering you \$87,000?" That she said: "Yes, and I refused it;" that he said: "Didn't you tell me you would take \$90,000 and you said yes?" That she said: "My price is \$90,000 and I won't give a commission;" and that he said: "If you sell it to those people you will have to pay a commission." It appeared that some months later defendant and her brother sold the building to the company which occupied it as a tenant and of which Mr. Smith was vice-president.

DEMANGE, GILLESPIE & DEMANGE, for appellant.

BARRY & MORRISSEY, for appellee.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

Abstract of the Decision.

1. **BROKERS, § 7***—*when evidence insufficient to show employment.* In an action to recover real estate brokerage commissions, evidence held insufficient to show any employment by the defendant to sell her property.

2. **BROKERS, § 32***—*necessity of employment.* The mere fact that a real estate agent was instrumental in finding a purchaser

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

First Nat. Bank of Lincoln v. Starkey, 190 Ill. App. 532.

who afterwards purchased the property from the owner at the price the latter told him she would take for it does not entitle the agent to a commission, unless he is able to show he was employed by her to find a purchaser.

**The First National Bank of Lincoln, Appellant, v.
Harry E. Starkey et al., Appellees.**

1. CREDITORS' SUIT, § 11*—*when creditor's bill will not lie to reach trust funds.* By section 49 of the Chancery Act (J. & A. ¶ 929) a creditor's bill will not lie to reach a fund held in trust when the trust or the fund has proceeded in good faith from some person other than the judgment debtor.

2. CREDITORS' SUIT, § 9*—*when distributive share of legatee cannot be reached.* A creditor's bill will not lie to reach the distributive shares of judgment debtors, as legatees under a will, before the order of distribution is made, where there is no fraud on the part of the executors and they have honestly and openly received the estate.

Appeal from the Circuit Court of Logan county; the Hon. THOMAS M. HARRIS, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914.

C. EVERETT SMITH and THOMAS D. MASTERS, for appellant.

W. A. COVEY, for appellees.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

This is a bill in chancery filed by the First National Bank of Lincoln, Illinois, the appellant, against Charles A. Nicholson and Harry E. Starkey, executors of the last will and testament of Aaron B. Nicholson, deceased, in their capacity as executors and also against other persons in their individual capacity to

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

reach the distributive interests in the estate of one Aaron B. Nicholson, deceased, of Mary B. Nicholson and Albert R. Nicholson, to pay a deficiency decree obtained by appellant against Mary B. Nicholson and Charles A. Nicholson in a foreclosure proceeding and a judgment obtained by confession against Charles A. Nicholson and Albert R. Nicholson. The bill alleges that on the second day of November, 1912, appellant obtained a judgment by confession against Charles A. Nicholson and Albert R. Nicholson for the sum of \$2,612.21, and that on the sixteenth day of November, 1912, the appellant in a foreclosure proceeding obtained a deficiency decree against Mary B. Nicholson and Charles A. Nicholson and that appellant had had execution issued on both judgments. The bill further alleges that on the third day of October, 1912, one Aaron B. Nicholson departed this life testate; that said will was duly probated in the County Court of Logan county, and by its terms he bequeathed his personal property, amounting to the sum of about \$30,000, to the said Mary B. Nicholson, Albert R. Nicholson, and to Emma Howell, Elvira Shaner, Ruth Ewing, Lillie E. Starkey and Edward R. Nicholson, residuary legatees, share and share alike; that appellee Charles A. Nicholson is the husband of the said defendant Mary B. Nicholson, and a brother of the defendant Albert R. Nicholson, and that the appellee Harry E. Starkey is a brother-in-law of the said appellee Charles A. Nicholson; that by the terms and provisions of said will, said appellees are nominated as the executors thereof, and that upon the probate thereof, letters testamentary issued to them out of and under the seal of the County Court of Logan county, and that said appellees have since been acting and are now acting as the executors thereof.

The bill further alleges that at the time of the death of the said Aaron B. Nicholson, according to land records of Logan county, Illinois, he was the owner in fee of certain real estate, described in said bill and lo-

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cated near the city of Lincoln; that appellant has been informed the said Aaron B. Nicholson, sometime before his death, conveyed said premises by deed to the said Mary B. Nicholson; that the said Mary B. Nicholson for the purpose of hindering, delaying and defrauding appellant has refused to file said deed for record and that appellant does not know whether by said deed the said Mary B. Nicholson took a life estate or the fee, and is unable to ascertain.

The bill further alleges that said appellees are insolvent; that they are serving as executors, as aforesaid, without bond; that the said Mary B. Nicholson and Albert R. Nicholson, judgment debtors, as aforesaid, have no property of any kind or description, except their said distributive share coming to them as legatees under the terms of the last will of the said Aaron B. Nicholson, deceased, and, excepting as to the said Mary B. Nicholson, the said real estate supposed to have been conveyed to her in the lifetime of the said Aaron B. Nicholson, which is of small value and in which she has a homestead.

The bill further alleges that the said Mary B. Nicholson, Charles A. Nicholson and Albert R. Nicholson have stated that they proposed to prevent appellant from satisfying its said judgment out of their said distributive shares and that although appellant has applied to the said Charles A. Nicholson and Harry E. Starkey, as executors, for information as to the amount of the distributive shares due the said Mary B. and Albert R. Nicholson under the terms of the last will of Aaron B. Nicholson, deceased, and as to when they would apply to the County Court of Logan county for an order of distribution in said estate, the said appellees, as executors aforesaid, have refused to give appellant such information or any information with respect to such matters.

The bill further alleges and points out that under the laws of this State, said appellees, as executors of the

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last will of Aaron B. Nicholson, deceased, cannot at any time before the County Court of Logan county makes an order of distribution in said estate be garnished, and that said appellees, as executors, are standing with and propose to aid the said Mary B. Nicholson and Albert R. Nicholson in preventing appellant from satisfying its said judgment claim against them, the said Mary B. and Albert R. Nicholson.

In so far as appellees are concerned, the bill prays that they may be required, at any time they apply to said County Court for an order of distribution of said personal property in said estate, to set up therein petition for said order, the said judgment claims of appellant against the said Mary B. and Albert R. Nicholson; that they give notice to appellant of the time when they shall apply to said County Court for such order of distribution, and that upon such order of distribution being made, they be required to pay to appellant the ascertained distributive shares of the said Mary B. and Albert R. Nicholson, or so much thereof as shall appear necessary to satisfy the amount of said judgments so held by appellant against said legatees, and that appellees be restrained from paying to the said Mary B. and Albert R. Nicholson, either upon partial or final distribution, any part of their legacies until the further order of court.

The executors demurred to the bill, the demurrer was sustained and the bill dismissed as to the executors.

The executors are trustees of the estate of the deceased and hold the estate in trust until an order of distribution has been made. The executors do not hold anything they have received from the judgment debtors. There is no fraud on their part and they have honestly and openly received the estate under the will and the legatees are simply beneficiaries under the will. An executor is a

City of Lincoln v. Thompson, 190 Ill. App. 536.

trustee of the estate. By section 49 of the Chancery Act (J. & A. ¶ 929), a creditor's bill will not lie to reach funds when the trust or the fund held in trust has proceeded in good faith from some person other than the defendants. The court properly dismissed the bill as to the executors.

Decree affirmed.

City of Lincoln by W. W. Houser, Appellee, v. A. D. Thompson, Appellant.

1. MUNICIPAL CORPORATIONS, § 377*—*when contract for local improvements invalid.* A city cannot let a contract for a local improvement without an ordinance and without advertising for bids, and where it does so the contract is without authority of law and the allowance and payment by the city of the contract price therefor is unauthorized.

2. MUNICIPAL CORPORATIONS, § 419*—*right to recover back money paid on illegal contract for local improvements.* Where a city lets a contract for street paving without an ordinance and without advertising for bids and the work is performed by the contractor and accepted and paid for by the city, any citizen may bring an action in the name of the City to recover back the money thus illegally expended.

Appeal from the Circuit Court of Logan county; the Hon. THOMAS M. HARRIS, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914.

HUMPHREY & ANDERSON, for appellant.

McCORMICK & MURPHY, for appellee.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

This is an action by the City of Lincoln, Illinois, on the relation of W. W. Houser, a taxpayer of said City,

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

appellee, against A. D. Thompson, appellant, to recover the sum of \$4,485.56 and interest, alleged to have been unlawfully paid by the City of Lincoln to the appellant on a paving contract. The case was decided on the pleadings. The appellee filed his declaration to which a demurrer was filed and overruled. Pleas were then filed to the declaration, to which demurrers were filed and sustained except the general issue to the common counts, which were withdrawn and judgment was entered by default and the damages assessed and judgment rendered. The errors assigned are, overruling the demurrer to the declaration and sustaining the demurrers to the pleas.

The facts and circumstances touching the making of the pavement and the payment of the amount in question here to the appellant are found and set forth in the case of *City of Lincoln v. Harts*, 250 Ill. 273, and 256 Ill. 253. The City of Lincoln made a contract with appellant to pave Kickapoo street in that City between the railroad tracks and paid him out of the general funds of the City. The contract amounted to over \$4,000. Two ordinances had been passed for the paving of this street, which had been declared void by the Supreme Court in the cause of *City of Lincoln v. Harts*, 256 Ill. 253. So far as this contract is based upon either one of these ordinances of course there can be no recovery, and the only question that remains is whether a municipality can let a contract without an ordinance and without advertising for bids to do work of this kind for this amount. Clearly the City had no right to do so as it was directly in conflict with the provisions of the statute in regard to local improvements, which prohibits a city from letting any such contracts in this way. The contract was without warrant of law and the allowance and payment by the City of the contract price therefor was unauthorized. The statute gives the right to any citizen to bring suit in the name of the City to recover for moneys illegally

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expended. That was done in this case and the judgment must be affirmed.

Affirmed.

Hayes Pump & Planter Company, Appellee, v. G. R. Lott and Harry M. Lott, Appellants.

(Not to be reported in full.)

Appeal from the Circuit Court of McLean county; the Hon. COLOSTIN D. MYERS, Judge, presiding. Heard in this court at the April term, 1914. *Affirmed.* Opinion filed October 16, 1914.

Statement of the Case.

Action by Hayes Pump and Planter Company against G. R. Lott and Harry M. Lott. The declaration consisted of the common counts with a sworn statement of the account sued on. To said declaration appellants filed a plea, and afterwards an amended special plea, therein pleading, in bar of the action, appellee's contract with appellants, averring that in and by said contract appellee sold to appellants the planter and supplies in question and assigned to appellants certain territory for the trade season; that said contract was entire; that appellee had breached the territorial provisions of the contract, and that therefore it could not recover for the planter sold and delivered to appellants. Appellee demurred to said plea craving over of said contract. The court sustained the demurrer and appellants excepted and elected to stand by said amended plea. Judgment on demurrer was entered in the sum of \$518.32, to reverse which judgment this appeal is prosecuted.

WIGHT & ALEXANDER, for appellants.

RAYBURN & BUCK, for appellee.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 323*—*when plea in bar of suit for price demurrable.* In an action for goods sold and delivered under a special contract, a special plea setting up in bar of the action a breach of a provision of the contract to assign to defendants certain territory, *held* wholly bad as being a plea in bar of the action and therefore demurrable.

2. SALES, § 59*—*when contract severable.* A contract containing an agreement by the buyer to pay for goods sold and delivered and an agreement by the seller to assign to the buyer certain territory for a trade season, *held* severable and not entire.

3. SALES, § 59*—*when covenant in contract is independent.* Where a contract contained an agreement by the buyer to pay for goods sold and delivered and also an agreement by the seller to assign to the buyer certain territory for a trade season, *held* that the agreement to pay for the goods was an independent agreement and that the territorial provisions were not conditions precedent to the agreement to pay for the goods.

4. SALES, § 331*—*amount of recovery.* In an action for goods sold and delivered, where the only plea filed was a special plea in bar of the action and such plea was bad and so *held* on demurrer, *held* that the plaintiff was entitled to a judgment for the amount sued for in the declaration.

George E. Lewis and R. M. Scanlan for use of George E. Lewis, Plaintiffs in Error, v. W. E. Rayburn, Defendant in Error.

(Not to be reported in full.)

Error to the Circuit Court of McLean county; the Hon. COLSTIN D. MYERS, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914. Rehearing denied December 2, 1914.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Lewis et al. v. Rayburn, 190 Ill. App. 539.

Statement of the Case.

Action by George E. Lewis and R. M. Scanlan for the use of George E. Lewis against W. E. Rayburn on a promissory note for \$750. There was a plea of the general issue, with an agreement that all evidence competent under any good plea which could have been pleaded should be heard at the trial. A jury being waived the case was tried by the court and defendant had judgment. To reverse the judgment, plaintiffs prosecute a writ of error.

The facts showed that the George H. Paul Company was engaged in selling Texas land and that plaintiffs were its agents and made an earnest money contract with defendant for the sale to him of one hundred and sixty acres of the land for \$5,040, payable \$1,680 at first payment and the balance in vendor's lien notes. The \$1,680 was paid by the defendant giving to plaintiffs his note for \$750 for their commission on the sale and a note to the George H. Paul Company for \$939, due one year after the date of the contract.

The land contract contained a clause that if defendant failed to pay any part of the earnest money when due, the George H. Paul Company had the option to declare the contract null and void and the amount paid should be forfeited as liquidated damages. Defendant paid in services as subagent the sum of \$685 on the \$930 note, but for failure to pay the balance therein the Company forfeited the contract. Thereafter the plaintiff brought this suit on the \$750 note.

DEMANGE, GILLESPIE & DEMANGE, for plaintiffs in error.

JACOB P. LINDLEY and W. W. WHITMORE, for defendant in error.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

Hill v. Hill, 190 Ill. App. 541.

Abstract of the Decision.

BROKERS, § 67*—*when consideration for note given for commissions fails.* Where a purchase of land of real estate agents under an earnest money contract gave his note to the agents for their commissions and also gave a note to the agents' principal as the first payment, and under the provisions of the contract the principal forfeited the contract for failure to pay the balance due on the latter note, *held* that the consideration for the note given to the agents failed and that the agents could not maintain an action therein, it appearing that the agents were not entitled to a commission under their contract with their principal until a cash payment had been made and the deed delivered.

Etta L. Hill, Appellee, v. Harmey B. Hill, Appellant.**(Not to be reported in full.)**

Appeal from the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914. Rehearing denied November 6, 1914. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Bill by Etta L. Hill against Harmey B. Hill for separate maintenance. The bill alleged that the complainant was married to defendant on September 2, 1906; that she lived with him as his wife until about May 1, 1913, when he abandoned her without fault on her part; that since said time he has refused and neglected to treat her as his wife; that on September 3, 1908, a male child was born to them, whose name is Glen Bernard Hill, who is still living; that he is now forcibly held and retained in the custody of defendant contrary to the wishes of complainant and contrary to a certain agreement entered into between them;

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Hill v. Hill, 190 Ill. App. 541.

and that defendant is an unfit person to have the care and custody of said infant son. The bill also alleged various acts of cruelty towards her on the part of defendant and that defendant in December, 1912, induced her to sign and acknowledge a certain contract, by the terms of which complainant and defendant were to reside separate and apart and by which defendant binds himself to pay complainant upon the execution of the same the sum of \$50 and thereafter on the twenty-seventh of each and every succeeding month, the said sum of \$50 for the support and maintenance of complainant, and by further provisions the care of the minor child, Glen Bernard Hill, was provided for. It was charged that such agreement was procured by means of fraud practiced by defendant. The bill further charged that appellant enjoys an income of from \$5,000 to \$10,000 a year and that the complainant has no means, and that defendant failed to carry out the terms of his said agreement with her and that he forcibly took from her the said infant son, Glen Bernard Hill. The prayer of the bill is that defendant be required to pay complainant a sufficient sum of money to enable her to defray the costs and expenses of carrying on her suit against him, and that the court find upon final decree that she was living separate and apart from defendant without her fault; that she be given the custody of the minor child and a sufficient sum of money to enable her to live according to her station in life; that said contract be set aside and that defendant be enjoined from taking said minor child out of the jurisdiction of the Circuit Court of Sangamon county.

The answer of defendant admitted the marriage, birth of the child, and that said child is in the custody of the defendant; denied that he is living separate and apart from complainant without her fault and averred that complainant is living separate and apart from him by reason of her own wrongful and improper conduct; and that by reason of her own wrongful and

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improper conduct he entered into the agreement pleaded in her bill of complaint in December, 1912, under which agreement complainant was to reside separate and apart from him and was to receive from him the sum of \$50 each month for her support and maintenance and was to have in her charge, subject to the supervision of defendant, the said infant child, Glen Bernard Hill; denied that complainant was induced to enter into said contract by virtue of any fraudulent conduct or acts on his part, but averred that complainant entered into said contract voluntarily and with a full understanding of the terms and conditions thereof; denied that he has been guilty of improper conduct and cruel treatment with respect to complainant; denied that he is not a fit person to have the care and custody of the child and averred that complainant, owing to her condition of health, is not a fit person to have the care and custody of said child.

A decree was rendered finding that complainant had sustained the allegations of her bill and that she was living separate and apart from defendant without her fault, and allowing her separate maintenance and the custody of the infant child, and decreeing that she be paid the sum of \$50 per month. To reverse the decree, defendant appeals.

HARDIN W. MASTERS and THOMAS D. MASTERS, for appellant.

W. ST. J. WINES, for appellee.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

Abstract of the Decision.

1. HUSBAND AND WIFE, § 264*—*when evidence shows living apart without wife's fault.* In a suit for separate maintenance, evidence held sufficient to sustain a finding that the parties were living apart

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Hill v. Hill, 190 Ill. App. 541.

without the wife's fault, where it appeared that they had lived together for six years and during that time the wife had been pregnant four times, which resulted in three miscarriages and one birth, that she underwent two surgical operations necessitated by birth of the child, which rendered her nervous and petulant, and that during those times the husband, instead of treating her with kindness and forbearance, was guilty of conduct which was cruel, unkind and shameful.

2. HUSBAND AND WIFE, § 212*—*when separation agreement enforceable.* Articles of separation making a provision for the wife should be upheld by a court of equity, if it appears that it was fairly and voluntarily entered into free from any sort of coercion, duress or fraud, and it further appears that the provision for the wife was fair and equitable in view of the property of the husband, the needs of the wife and their station in life.

3. HUSBAND AND WIFE, § 223*—*effect of separation agreement on right to maintain bill for separate maintenance.* A decree of separate maintenance finding that the court had jurisdiction of the subject-matter of complainant's bill and that she had the right to maintain the same, *held* not improper because of the fact that the parties had entered into a separation agreement, where the contract was unfair and inequitable to the complainant, and it appeared it was executed under a misunderstanding on her part of its terms and meaning while she was in a nervous condition of mind brought about by the cruel and unkind treatment of the husband, and it also appeared that the husband had breached the contract by refusing to make payments for her support.

4. HUSBAND AND WIFE, § 243*—*when allowance for wife's separate maintenance not excessive.* A decree in a separate maintenance proceeding ordering the husband to pay the wife \$50 per month, *held* not excessive where it is admitted by the husband that he enjoys an income of \$250 per month.

5. HUSBAND AND WIFE, § 239*—*power of court in making allowance for wife.* Fixing the amount of alimony in a separate maintenance proceeding rests in the sound discretion of the court, having reference to the conditions of the parties in life and the circumstances of the case.

6. HUSBAND AND WIFE, § 264*—*when finding as to custody of child sustained by evidence.* In an action for separate maintenance, a finding that it would be for the best interest of an infant son that the wife have his custody, care and control, *held* warranted by the evidence.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**W. F. Hackman, Administrator, Appellee,
Staunton and Staunton Telephone Compan
ton Telephone Company, Appellant.)**

1. **DEATH, § 36***—*essential averments of declaration.* for wrongful death, the declarations must allege that t left next of kin surviving.

2. **MASTER AND SERVANT, § 537***—*essential averments tion.* In an action for wrongful death based on a viol Act of 1903 (J. & A. ¶ 5317) forbidding the employment under sixteen years in any dangerous occupation, the must allege facts necessary to show that plaintiff's intest of the class entitled to the benefit of the statute.

3. **MASTER AND SERVANT, § 523***—*when amended decla up new cause of action.* In an action against an employ death of a servant based on a violation of the Act of 1903 (¶ 5317) prohibiting the employment of children under sixteen years in dangerous occupations, an amended decla plying the deficiencies of original declaration by allegir of the deceased and that he left next of kin surviving to allege a new cause of action.

4. **PLEADING, § 231***—*right to plead de novo.* The righ *de novo* rests in the discretion of the trial court, and the will not be interfered with except on a showing of gross

5. **PLEADING, § 355***—*when permitting withdrawal of pl abuse of discretion.* Action of court in permitting a def withdraw a plea of general issue and to file a demurr declarations, *held* not an abuse of discretion.

Appeal from the Circuit Court of Macoupin county;
JAMES A. CREIGHTON, Judge, presiding. Heard in this cou
April term, 1914. Reversed and remanded with direction
ion filed October 16, 1914.

**WILLIAMSON, BURROUGHS & RYDER, for appell
S. CLARKE and H. H. WILLOUGHBY, of counsel.**

**TRUMAN A. SNELL, for appellee; EDWARD C. F
and PEEBLES & PEEBLES, of counsel.**

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterl
topic and section number.

Hackman v. City of Staunton et al., 190 Ill. App. 545.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

This is an action on the case brought by W. F. Hackman, administrator of the estate of Hobart Hackman, deceased, against The Staunton Telephone Company and the City of Staunton jointly for the alleged wrongful death of said Hobart Hackman which occurred July 20, 1912. The original declaration consisting of two counts was filed May 23, 1913. To this declaration the defendants filed a plea of general issue. On October 18, 1913, the defendants by leave of court withdrew their plea of general issue and filed a demurrer to the declaration, which demurrer was sustained as to the defendant City of Staunton and overruled as to the defendant Staunton Telephone Company. Plaintiff then by leave of court amended his declaration and dismissed his suit as to the City of Staunton. To this amended declaration the defendant Staunton Telephone Company filed first the plea of general issue and second and third the pleas of the statute of limitations. Plaintiff moved to strike the pleas of the statute of limitations from the files, which motion was overruled. Plaintiff then demurred to the pleas of the statute of limitations and the demurrer was sustained. During the trial of the case, plaintiff by leave of court again amended his amended declaration. Defendant demurred to this amended declaration as amended which demurrer was overruled, and defendant then filed his plea of general issue and pleas of the statute of limitations.

Plaintiff demurred to the pleas of the statute of limitations and the demurrer was sustained. At the close of the plaintiff's testimony the court directed a verdict of not guilty as to the first count, and the trial proceeded upon the second count of plaintiff's amended declaration as amended. The jury returned a verdict finding the defendant guilty and assessing the plaintiff's damages at two thousand dollars. Judgment

was entered upon the verdict and the defendant appealed.

The errors assigned that we think it need consider are, sustaining the demurrer to the pleas of the statute of limitations and directing a verdict for the defendant.

The second amended count as amended of declaration is the only one necessary for consideration, as there were no errors assigned in directing a verdict as to the first count. The count of the declaration as originally filed contained allegations as to the age of plaintiff's intestate Hackman. This second count was based upon Act of 1903 (J. & A. ¶ 5317), which forbids the employment of children under the age of sixteen years in occupation dangerous to their lives or limbs. The statute relates only to the employment of children under sixteen years of age; consequently it was necessary to show that plaintiff's intestate was a member of a class entitled to the benefit of such statute. The age of deceased was a material and essential fact necessary to be proven in order to entitle him to the benefits of the statute. *Swift & Co. v. Board of Education*, 119 Ill. App. 173-179.

The second count as originally filed also failed to allege that deceased left next of kin surviving. The allegation is a material one, as without it no cause of action exists. *West Chicago St. R. Co. v. Mabie*, 77 Ill. App. 176; *Foster v. St. Luke's Hospital*, 191 Ill. 94; *Lake Shore & M. S. Ry. Co. v. Hessions*, 150 Ill. 546. By the amendments to the second count the plaintiff was permitted to allege the age of the deceased at the time of his injury and what next of kin he left surviving. These amendments stated a new cause of action and were made more than one year after the cause of action occurred. The statute of limitations was a good plea, and the demurrer should have been overruled and the peremptory

Gogerty v. City of Decatur, 190 Ill. App. 548.

struction given to find for the defendant. Plaintiff complains about the ruling of the court in permitting the defendant to withdraw its plea of general issue and demurrer to appellee's declaration, and upon the subsequent ruling of the court on pleadings.

The right to plead *de novo* has always rested in the discretion of the trial court, and it certainly cannot be reversed except on showing the grossest abuse. We have examined the record carefully and find there was no abuse of that discretion. The pleas of the statute of limitations were good pleas, and after plaintiff amended his declaration the court should have permitted them to be filed. However, no cross-errors were assigned by plaintiff in this action of the court, and this matter is not before us.

For the errors indicated the judgment is reversed with direction to the court to overrule the demurrer to the pleas of the statute of limitations.

Reversed and remanded with directions.

Honora Gogerty, Appellee, v. City of Decatur, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Macon county; the Hon. WILLIAM C. JOHNS, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914.

Statement of the Case.

Action by Honora Gogerty against the City of Decatur to recover damages to plaintiff's real estate caused by the lowering of the street in front of the property to make an underground railroad crossing.

The declaration was in three counts. The first count, in substance, alleged that the City of Decatur

made "large excavations and did cut out of said street and dig up the same with scrapers, spades and shovels, and other implements, so that the street is cut down from its original grade, to-wit, sixteen feet, immediately in front of and contiguous to plaintiff's premises on said North Jasper street, for the purpose of a subway under the tracks of a certain railway therein situate." The declaration further charges that the plaintiff's property and buildings have been much injured and damaged and the rental value thereof much impaired and lessened, and that by reason and in consequence thereof, the market value of plaintiff's said property has been and is injured and is much depreciated, all caused and occasioned by the said defendant, and that such depreciation is special to said premises, and that by means thereof plaintiff's premises have become particularly worthless and of lessened value to her.

The second count alleged that plaintiff was entitled to the peaceable enjoyment of her property, etc., without said premises being damaged or injured by the wrongful or illegal acts upon the part of the defendant which permanently and specially depreciated the value of said premises; and further alleged that an excavation was made which lowered the grade or surface in front of plaintiff's premises on Jasper street, to wit, sixteen feet extending northward and southward one hundred feet in each direction, and by the means whereof, the right of egress from Jasper street to and from plaintiff's premises was cut off and totally destroyed, and that she sustained special damage, etc.

The third count of the declaration was a complete description of the premises, the change of grade, and stated that the plaintiff's property had been specially and permanently damaged and that all of these acts were without the consent of the plaintiff. A general demurrer to the declaration being overruled, the appellant filed a plea of not guilty. To reverse a judgment in favor of plaintiff for two thousand dollars, defendant appeals.

Gogerty v. City of Decatur, 190 Ill. App. 548.

BALDWIN & CAREY, for appellant; JAMES S. BALDWIN and WILLIAM J. CAREY, of counsel.

WHITLEY, FITZGERALD & McLAUGHLIN, for appellee.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

Abstract of the Decision.

1. MUNICIPAL CORPORATIONS, § 448*—*when suit for damages resulting from lowering grade of street not premature.* An action against a city to recover damages to property by reason of lowering the grade of the street in front thereof, *held* not prematurely brought where the work in front of the property had been substantially completed and had progressed to such an extent as to obstruct ingress and egress at the time the suit was commenced.

2. MUNICIPAL CORPORATIONS, § 451*—*when permitting jury to damaged premises not error.* In an action against a city for damages resulting to property by lowering the grade of the street, permitting the jury to view the premises, *held* not an abuse of discretion and not error, it appearing that the jury were instructed that the view was not evidence.

3. EVIDENCE, § 365*—*opinions.* The qualification of witnesses to give their opinion is a question for the court in the first instance, but the weight to be given their opinions is to be determined by the jury, from the knowledge and experience of the witnesses and their capacity to form a judgment.

4. EVIDENCE, § 372*—*persons qualified to give opinion as to value.* All persons who are acquainted with property and have opinions of its value may give their opinions to the jury, together with their knowledge of the property and the facts upon which the opinions are based.

5. EVIDENCE, § 372*—*when witnesses qualified to give opinion as to value of real estate.* Witnesses *held* properly qualified to give their opinion of the value of real estate, where they stated that they were acquainted with the situation and location of the property and in a general way were acquainted with the value of real estate in the locality where the property in question is located.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Anna D. O'Harra, Plaintiff in Error, v. C. E. Graves
and W. E. Stephens, Administrator, Defendants in
Error.**

1. **WILLS, § 447***—*when settlement between legatee and heirs enforceable.* Where upon a will contest a legatee entered into an agreement to take a less sum than the amount of her legacy, *held* that the settlement was of a disputed right and enforceable as a full satisfaction of her legacy in the absence of fraud.

2. **TRIAL, § 293***—*when rulings on propositions of law not error.* Rulings of court on propositions of law cannot be held to be error where the parties were not entitled to a jury trial and therefore not entitled to the submission of such propositions.

Error to the Circuit Court of McLean county; the Hon. COLSTIN D. MYERS, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914.

S. P. ROBINSON, for plaintiff in error.

WELTY, STERLING & WHITMORE and DEMANGE, GILLESPIE & DEMANGE, for defendants in error.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

The plaintiff in error, Anna D. O'Harra, filed her petition in the County Court of McLean county, praying that the administrator *de bonis non*, with will annexed of the estate of Abraham Stephens, deceased, be ordered to make an accounting and to pay her legacy as provided by said will.

Abraham Stephens died in December, 1908, leaving a will disposing of an estate of about \$300,000. The residue was by the will given to be divided between the plaintiff in error, Anna D. O'Harra, Mary Ella Chapman, to each one-third, and the remaining one-third to the children of Richard Stephens, a brother of testator. The will was duly probated and after the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

will was probated, Addie Wooster, Fannie Westover and Abraham Squires, heirs at law of Abraham Stephens, filed a bill to contest the will on the ground of lack of capacity and undue influence on the part of Anna D. O'Harra, the petitioner, and Mary Ella Chapman.

While the will contest was being tried by a jury an agreement was entered into by plaintiff in error and Mary Ella Chapman with Addie Wooster and Abraham Squires, the contestants, and the suit dismissed. By the agreement the petitioner in error, Anna D. O'Harra, and Mary Ella Chapman assigned to George L. Parker of Bloomington, Illinois, their legacies in trust, and upon payment to said trustee by the contestants or the administrator with will annexed to be appointed of \$61,800, the said legacies and bequests given to the plaintiff in error and Mary Ella Chapman would be paid and satisfied in full and the receipt given by said trustee for the same would be a full receipt for said legacies. The money so paid to said trustee was to be distributed and paid out by him under the direction of the said Anna D. O'Harra and said Mary Ella Chapman.

A decree was then entered confirming the will by agreement. The \$61,800 was paid to the trustee by the administrator *de bonis non* from the funds of the estate, but some question arising as to the inheritance tax, \$3,000, was withheld by the trustee from Anna D. O'Harra and Mary Ella Chapman until the inheritance tax should be settled. The \$61,800 was ordered by Chapman and O'Harra to be paid by the trustee—\$25,000 to Mrs. Chapman and \$15,000 to Mrs. O'Harra and the balance to their attorney. The residuary legacies amounted to about \$71,000 each. The petitioner in error has actually received \$12,000, but the entire sum agreed upon was paid to the trustee. The petition stated that petitioner had only received \$15,000, Mrs. Chapman \$35,000 and their attorney the

O'Harra v. Graves et al., 190 Ill. App. 551.

balance of the agreed \$61,800; that the remainder of the residuary legacy to her, about \$58,900, that she has not received ought to be paid to her. The County Court ordered the accounting but denied the last part of the prayer. On an appeal the Circuit Court made the same order and she prosecutes this writ of error.

Error is assigned on the holding and refusing propositions of law. This was not a matter where the parties were entitled to a jury, hence there can be no error in the ruling of the court on the propositions, but the court held correctly as to the propositions.

It is contended that a payment of a less sum than the legacy is only a satisfaction *pro tanto*. The settlement was of a disputed right. If the contest of the will had been tried, Mrs. O'Harra and Mrs. Chapman, if defeated, would have received nothing, but by the settlement they made sure of \$61,800. Such settlements are favored and will be enforced. *Smith v. Smith*, (36 Ga. 184), 91 Am. Dec. 761; *Adams v. Crown Coal & Tow Co.*, 198 Ill. 445.

The plaintiff in error having entered into the agreement and there being no fraud and it being a settlement of a doubtful right, she cannot now insist on having what the will gave her. There was no error and the decree of the Circuit Court will be affirmed.

Affirmed.

Dunham v. Stephens, 190 Ill. App. 554.

Polly Dunham, Appellant, v. Estate of Abraham Stephens, Deceased, Appellee.

WILLS, § 494*—*when portion of legacy remaining after reduction by compromise agreement becomes intestate estate.* Where, upon a will contest, certain legatees entered into a compromise agreement with the contestants to take a less sum than the full amount of their legacies to avoid the litigation, and the money was so paid by the administrator with the will annexed to a trustee for the legatees as provided by the agreement, *held* that the money thus saved did not belong to the contestants, but became intestate estate and descended to the heirs.

Appeal from the Circuit Court of McLean county; the Hon. COLSTON D. MYERS, Judge, presiding. Heard in this court at the April term, 1914. Reversed and remanded with directions. Opinion filed October 16, 1914. Rehearing denied December 10, 1914.

LIVINGSTON & BACH and THURMAN, HUME & KENNEDY, for appellant.

DEMANGE, GILLESPIE & DEMANGE and WELTY, STERLING & WHITMORE, for appellee.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

This is an appeal from the order of the Circuit Court of McLean county, sustaining a demurrer filed by the administrator with will annexed, of the estate of Abraham Stephens, deceased, and certain of his legatees, to the petition of appellant, Polly Dunham, praying for an order of distribution. The petition sets up: (1) That appellant is an heir at law and a legatee under the last will and testament of Abraham Stephens, deceased; (2) the will of Abraham Stephens, deceased; (3) that Addie Wooster, Fannie Westover and Abraham Squires filed a bill in the Circuit Court to contest said will; (4) that petitioner took no part in

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

said will contest; (5) that while the suit to contest the will was being tried and much of the evidence had been introduced the suit was compromised and a stipulation entered into between the contestants, Addie Wooster and Abraham Squires (the said Fannie Westover being dead) on one side and the defendants Mary Ella Chapman and Anna D. O'Harra on the other, which said stipulation was as follows:

“This agreement, made this 9th day of November, A. D. 1909, by and between Addie Wooster and Abraham Squires by Alfred G. Roberts, his curator, parties of the first part, and Mary Ella Chapman and Anna D. O'Harra, parties of the second part, Whereas said parties of the first part have heretofore filed a bill in the Circuit Court of McLean county, Illinois, to set aside the will of the said Abraham Stephens, deceased, said will having been dated December 10, 1908. Whereas said parties of the second part, with other parties, were made defendants to said bill. Whereas it is the desire of the parties hereto to settle said litigation. It is therefore agreed by and between the parties as follows: First. That there shall be a decree of said Circuit Court confirming said will. Second. That said Mary Ella Chapman and Anna D. O'Harra do hereby assign to George L. Parker of Bloomington, Illinois, their legacies and devises given to them under said will, in trust, as hereinafter provided, that is to say, that upon the payment to the trustee by the said parties of the first part, or the administrator with the will annexed of said Abraham Stephens to be hereinafter appointed the sum of Sixty-one Thousand Eight Hundred Dollars (\$61,800) the said legacies and bequests given to the said Mary Ella Chapman and Anna D. O'Harra shall be deemed paid and satisfied in full; and the receipt given by the said trustee for the same shall be deemed a full receipt for said legacies and bequests.

“That the said money so paid to said trustee shall be distributed and paid out as per directions of the said Mary Ella Chapman and Anna D. O'Harra. Third. That the said Sixty-one Thousand Eight Hun-

dred Dollars (\$61,800) and the legacies given to Hulda Ellen Gloyd, Bertha Gloyd, Ralph Gloyd, Sherman L. Robbins, Minor Kimball, Howard Kimball, and Galen V. R. Gloyd, shall be paid by January 1, 1911; and such portion of said sum of money and said legacies shall not be paid within ninety days of this date, shall draw interest at the rate of six per cent per annum after said ninety days, until paid; which interest, the parties of the first part, or the administrator with the will annexed, shall pay. Fourth. The court costs of said suit are to be paid by the estate of the said Abraham Stephens in due course of administration. This agreement signed in duplicate the day and year first above written. The provision of the will relating to household goods shall stand. Mary Ella Chapman, Anna D. O'Harra, Addie Wooster, Abraham Squires." (6) That pursuant to said stipulation a decree was entered confirming said will. The \$61,800 was paid to George L. Parker, trustee, as provided in the above stipulation and ordered paid out by Mary Ella Chapman and Anna D. O'Harra, the two legatees. The will bequeathed \$15,000 to Mary Ella Chapman and one-third of the residue; to Anna D. O'Harra one-third of the residue of the estate; and to the children of Richard Stephens one-third of the residue of the estate. The legatees, Mary Ella Chapman and Anna D. O'Harra, are the two legatees who for \$61,800 agreed that the will should be confirmed and their legacies paid by the payment of \$61,800 to the trustee to whom the legacies are assigned.

The only question involved in this appeal is, whether or not the difference in the amount that Mrs. Chapman and Mrs. O'Harra would have received under the will and the amount for which they sold and assigned their legacies became intestate property and descended to the heirs at law of Abraham Stephens.

The contention of appellee is that the compromise agreement between the parties settling the will con-

test suit effected a purchase of the legacies of Mrs. Chapman and Mrs. O'Harra, leaving the will to stand, under which agreement those two legacies were assigned to Parker in trust; that the purchase was not made for the heirs at law of Abraham Stephens, but for such persons as Mrs. Wooster and Abraham Squires should choose to designate; and that in no event could petitioner, having refused to contest the will, profit by the fruits of that contest; and that the contest having resulted in a decree of court confirming the will, and the will having made all the testator's property testate, petitioner could and can demand only the specific legacy bequeathed to her by that will, and that no legacy bequeathed by the will having lapsed, there is and can be no intestate estate to descend to any heir at law.

The contention of appellee cannot be sustained. The stipulation contains no intimation that any person is to secure the benefit of the assignment of the legacies of Mrs. Chapman and Mrs. O'Harra to the trustee, unless it be inferred that the two contestants, who with the legatees signed the stipulation, are to be beneficiaries of the assignment. The contestants did not pay the \$61,800, but it was paid from the funds of the estate by the administrator *de bonis non*. No secret advantage or profit could be obtained by the administrator of the estate from the use of funds belonging to the estate, neither could the money be loaned or advanced to Addie Wooster or Abraham Squires for the purpose of making profit for themselves. The legacies did not lapse, they were paid for from the funds of the estate and a large sum thereby saved, to wit, the \$15,000 specific legacy and all of the two-thirds of the residuary legacies except such sum as was paid for the two residuary legacies plus the specific legacy. The money thus saved became intestate estate and should descend accordingly. The court erred in sustaining the demurrer and dismissing the petition, and

Anderson et al. v. Benjamin, 190 Ill. App. 558.

the case is reversed and remanded with directions to overrule the demurrer.

Reversed and remanded with directions.

**Elijah Anderson and John W. Anderson, Appellees v.
A. P. Benjamin, Appellant.**

(Not to be reported in full.)

Appeal from the County Court of McLean county; the Hon. HOMER W. HALL, Judge, presiding. Heard in this court at the April term, 1914. Reversed. Opinion filed October 16, 1914.

Statement of the Case.

Action by Elijah Anderson and John W. Anderson against A. P. Benjamin to recover damages occasioned by the failure of defendant to deliver to plaintiffs a certain quantity of hay claimed to have been purchased by plaintiffs from defendant. The suit was originally brought before a justice of the peace and judgment was taken by default. Defendant appealed to the County Court and plaintiff recovered a judgment for fifty dollars. To reverse the judgment, defendant appeals.

LESTER H. MARTIN and WESLEY M. OWEN, for appellant.

F. Y. HAMILTON, for appellees.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

Abstract of the Decision.

1. SALES, § 373*—*when evidence insufficient to show completed contract of sale.* Evidence held insufficient to show a completed

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

contract for the sale of hay so as to authorize the buyer to recover damages for nondelivery, where no time was fixed for delivery and payment and the seller only agreed to sell the hay provided he could get his son to bale it, and the hay was never baled and the buyer never made a demand for it or offered to pay for it.

2. SALES, § 124*—*when time for payment and delivery concurrent.* Where contract is silent, the time of payment and delivery are to be concurrent.

George E. Black, Appellee, v. William H. Black, Appellant.

1. EXCHANGE OF PROPERTY, § 8*—*when evidence of value of property inadmissible.* In an action where the issue was whether plaintiff made false representations concerning the drainage of lands exchanged, permitting witnesses for plaintiff to testify as to the value of the land, *held* error for the reason that there was no such issue and that it was immaterial.

2. EVIDENCE, § 224*—*when testimony of witness is hearsay.* Testimony of a witness as to how much corn and oats were grown on a farm during a certain year should be excluded as hearsay where he states that he got his information from a certain book.

3. EXCHANGE OF PROPERTY, § 8*—*when instruction as to false representations erroneous.* An instruction that defendant would not be justified in relying on plaintiff's representations concerning lands exchanged unless the defendant "did not have equal means of ascertaining the facts," *held* erroneous.

4. INSTRUCTIONS, § 7*—*when must be accurate.* Where evidence is in direct conflict, the instructions must be unambiguous and accurate or the judgment will be reversed.

Appeal from the Circuit Court of Macon county; the Hon. WILLIAM C. JOHNS, Judge, presiding. Heard in this court at the April term, 1914. Reversed and remanded. Opinion filed October 16, 1914. Rehearing denied December 2, 1914.

LE FORGEE, VAIL & MILLER and WHITLEY, FITZGERALD & McLAUGHLIN, for appellant.

CREA & HOUSUM and W. W. REEVES, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

This is a suit on a promissory note for \$7,800 given by appellant to appellee in settlement of a balance due on a trade of lands. The lands are located in Champaign and Douglas counties.

The declaration consisted of a count on a promissory note in the ordinary form and the common counts. The pleas are the general issue and a partial failure of consideration because of false representation as to the drainage of the land lying in Champaign county and a misrepresentation as to the time a note bearing seven per cent interest was to run. The case was tried by a jury which returned a verdict in favor of appellee and against appellant for \$8,508.81. Judgment was entered upon the verdict and appellant appeals. The errors assigned are on the admission and rejection of improper evidence and the giving and refusing of instructions.

On the trial of the case the court permitted two witnesses, over the objection of appellant, to testify as to the value of the one hundred and twenty acres in Douglas county. This was error, as there was no issue as to the value of that land and it was immaterial. The admission of this testimony, however, might be justified on the theory that appellant first introduced evidence on that question. If appellant made a good trade on the Douglas county land and appellee paid more than it was worth, appellant was entitled to the benefit of his trade. *Drew v. Beall*, 62 Ill. 164; *Antle v. Sexton*, 137 Ill. 416. The court also, over the objection of the appellant, permitted the witness DeLong to testify how much corn and oats were grown on the farm in 1911. His testimony was objected to on the ground he was not testifying from his own knowledge. He was then asked where he got his information and stated that he got it from the book of the Baldwin Elevator Company. A motion was made to exclude his

Hidden v. Baker, 190 Ill. App. 561.

testimony and was overruled. This was error. The evidence was purely hearsay and should not have been admitted.

It is also urged that the court erred in giving appellant instructions 8 and 6 as modified. The concluding lines of those instructions, "did not have equal means of ascertaining the facts," are erroneous. Appellant if he did not know the facts had the right to rely on representation if made to induce the trade. On the merits of the case we think the verdict and judgment are right, but the evidence is in direct conflict. Where the evidence is in direct conflict, the instructions must be ambiguous and accurate or the judgment will be reversed. *Holloway v. Johnson*, 129 Ill. 367; *Junction Min. Co. v. Goodwin*, 109 Ill. App. 144. For the errors indicated, the judgment will be reversed and the case remanded for a new trial.

Reversed and remanded.

**Maggie M. Hidden, Appellee, v. William K. Baker, Jr.,
Appellant.**

(Not to be reported in full.)

Appeal from the Circuit Court of Moultrie county; the Hon. WILLIAM G. COCHRAN, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914.

Statement of the Case.

Action by Maggie M. Hidden against William K. Baker, Jr., to recover damages for injuries suffered by her as a result of a conspiracy entered into by the defendant with others to commit a criminal assault upon plaintiff. The defendant was sued alone. The plea was the general issue. Plaintiff had verdict and

Hidden v. Baker, 190 Ill. App. 561.

judgment for one thousand dollars. To reverse the judgment, defendant appeals.

The errors assigned by defendant were the rulings of the court as to admission and rejection of evidence, the giving and refusing of instructions and that the damages were excessive.

The evidence showed that defendant and others after drinking intoxicating liquors went to the home of plaintiff and her husband after midnight and called for plaintiff's husband to come out to the road where defendant's companions were; that plaintiff's husband went out to where they were and while he was talking to them the defendant entered plaintiff's bedroom and made an assault upon plaintiff.

JAMES W. and EDWARD C. CRAIG and JACK & WHITFIELD, for appellant.

E. J. MILLER, for appellee.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

Abstract of the Decision.

1. ASSAULT AND BATTERY, § 22*—*when damages for wilful and wanton assault not excessive.* In an action to recover damages for an assault on a married woman at her home in the nighttime, where such assault was wilful and wanton and the result of a conspiracy, a judgment for one thousand dollars *held* not excessive.

2. DAMAGES, § 96*—*when exemplary damages recoverable without proof of actual damages.* Where an assault is wilful and wanton it is not necessary to prove actual damages in order to recover exemplary damages.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**W. D. Smidt, Defendant in Error, v. J. C. Dubois,
Plaintiff in Error.**

(Not to be reported in full.)

Error to the County Court of De Witt county; the Hon. FRED C. HILL, Judge, presiding. Heard in this court at the April term, 1914. Reversed and remanded. Opinion filed October 16, 1914.

Statement of the Case.

Action by W. B. Smidt against J. C. Dubois to recover \$1,000 claimed to be due on an open account for sawing lumber and hauling. The declaration consisted of the common counts and the plea was the general issue. There was a verdict and judgment in favor of plaintiff for \$545.95. To reverse the judgment, defendant prosecutes error.

JOHN FULLER, L. E. STONE and W. F. GRAY, for plaintiff in error.

A. F. MILLER and E. B. MITCHELL, for defendant in error.

MR. JUSTICE SCHOLFIELD delivered the opinion of the court.

Abstract of the Decision.

1. EVIDENCE, § 255*—*when book of account admissible.* In an action on an open account for sawing and hauling lumber for defendant, plaintiff's account book *held* properly admitted in evidence, where he testified that the entries were true and just and that they were made each day at the mill on a board as the sawing was done and each evening transferred on the book.

2. TRIAL, § 71*—*effect where witness has violated rule excluding witnesses.* Ordinarily the party complaining should not be deprived of the testimony of a witness because the latter has violated a rule

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Smidt v. Dubois, 190 Ill. App. 563.

excluding witnesses from the court room; the witness should be punished for contempt.

3. TRIAL, § 71*—*discretion of court in permitting a witness to testify after violation of rule excluded witnesses.* Action of trial court in refusing to allow a witness to testify after he violated a rule excluding witnesses from the court, *held* not an abuse of discretion.

4. APPEAL AND ERROR, § 1491*—*when exclusion of testimony harmless.* Refusal to permit a witness to testify, *held* not reversible error where his offered testimony was in regard to a written schedule, and the schedule itself was the best evidence, and the failure to produce the schedule was unaccounted for.

5. APPEAL AND ERROR, § 1512*—*when improper remarks of court harmless.* Remarks of court in refusing defendant to be represented by additional counsel in the case at the close of the examination of the jury, *held* not reversible error.

6. APPEAL AND ERROR, § 1500*—*when limiting number of counsel harmless.* Action of court at the close of examination of the jury in refusing to permit defendant to have other counsel appear for him in the case, *held* not reversible error, where it appeared that the person proposed as additional counsel thereafter took part in the trial and that defendant was ably represented by other counsel.

7. ACCOUNT, ACTION ON, § 2*—*sufficiency of instructions.* Instructions singling out plaintiff's book account and prominently calling the attention of the jury thereto, *held* bad.

8. ACCOUNT, ACTION ON, § 2*—*sufficiency of instruction.* In an action to recover a sum claimed to be due on open account, an instruction eliminating the question of payment as a defense from the consideration of the jury, *held* bad.

9. ACCOUNT, ACTION ON, § 2*—*sufficiency of instruction.* In a suit on an open account, an instruction *held* bad for the reason that it took away from the defendant the benefit of all circumstances proven which would indicate payment.

10. INSTRUCTIONS, § 7*—*when should be accurate.* Where the evidence is in direct conflict, the jury should be accurately instructed as to the law.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**John C. Hoxsey, Appellant, v. St. Louis & Springfield
Railway Company, Appellee.**

(Not to be reported in full.)

Appeal from the Circuit Court of Macoupin county; the Hon. JAMES A. CREIGHTON, Judge, presiding. Heard in this court at the April term, 1914. Affirmed. Opinion filed October 16, 1914.

Statement of the Case.

Action by John C. Hoxsey against the St. Louis & Springfield Railway Company to recover for personal injuries sustained by plaintiff by coming in contact with a wire of a certain telephone company which fell upon the trolley wire of defendant and became charged with electricity. On the first trial of the case the plaintiff recovered a judgment which was reversed and remanded on an appeal to the Appellate Court in 171 Ill. App. 109, the cause for reversal being that the declaration did not state a cause of action and was insufficient to support a judgment even after verdict.

After the cause was reinstated in the trial court, which was more than two years subsequent to the time of the injury, plaintiff amended the declaration by inserting therein certain additional averments. Defendant filed a plea of the general issue and a plea of the statute of limitations. A demurrer filed to the latter plea was overruled, and plaintiff electing to stand by his demurrer, judgment was rendered against him. To reverse the judgment, plaintiff appeals.

EDWARD C. KNOTTS and PEEBLES & PEEBLES, for appellant.

RINAKER & RINAKER and GEORGE W. BLACK, for appellee; GEORGE W. BUBTON, of counsel.

PER CURIAM.

Hoxsey v. St. Louis & Springfield Ry. Co., 190 Ill. App. 565.

Abstract of the Decision.

1. APPEAL AND ERROR, § 1725*—*when decision on former appeal conclusive.* The decision of the Appellate Court in a former appeal on questions of law involved cannot be reviewed and is binding on the parties and such court on a subsequent appeal.

2. LIMITATIONS OF ACTIONS, § 53*—*when amended declaration constitutes commencement of action.* In an action for personal injuries, where the suit was brought within the prescribed time by the filing of a declaration which did not state a cause of action and an amended declaration was filed which for the first time stated a cause of action, the suit is regarded as begun when the amended declaration was filed, and if the amended declaration is not filed within two years from the date of the injury, a plea of the statute of limitations is a good defense.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

CASES
DETERMINED IN THE
FOURTH DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS
DURING THE YEAR 1914.

**Roley Wright, Defendant in Error, v. Chicago-Herrin
Coal Company, Plaintiff in Error.**

(Not to be reported in full.)

Error to the Circuit Court of Williamson county; the Hon. RICHARD S. FARRAND, Judge, presiding. Heard in this court at the October term, 1913. Reversed and remanded. Opinion filed May 1, 1914. Rehearing denied and opinion modified October 28, 1914.

Statement of the Case.

Action by Roley Wright against Chicago-Herrin Coal Company, a corporation, to recover the value of coal alleged to have been removed by defendant from beneath lands owned by plaintiff. The defendant filed a plea of not guilty and also a plea of tender for the wrong done in the amount \$42.35. The jury returned a verdict for plaintiff, and also in answer to interrogations specially found, that the fair cash market value of the coal at the top of defendant's mine was ninety-five cents per ton, and that the cost of transportation

Wright v. Chicago-Herrin Coal Co., 190 Ill. App. 567.

per ton from the place it was mined to the top of the shaft was forty-five cents per ton. To reverse a judgment entered on the verdict in favor of plaintiff for \$500, defendant prosecutes error.

Defendant urged as ground for reversal that the verdict and special findings were not sustained by the evidence.

DENISON & SPILLER, for plaintiff in error.

NEELY, GALLIMORE, COOK & POTTER, for defendant in error.

MR. PRESIDING JUSTICE McBRIDE delivered the opinion of the court.

Abstract of the Decision.

1. MINES AND MINERALS, § 7*—*when finding as to cost of transportation of coal to top of mine warranted by evidence.* In an action to recover the value of coal alleged to have been removed from beneath the land of plaintiff, *held* that a special finding of the jury that the cost of transporting the coal to the top of the mine was forty-five cents per ton would not be disturbed on the ground that the evidence showed the cost of transportation was more, where it appeared that according to the verdict plaintiff was allowed fifty cents a ton for the coal and that defendant made a tender of that sum per ton as the value of the coal.

2. MINES AND MINERALS, § 7*—*when finding as to amount of coal taken contrary to evidence.* In an action to recover the value of coal removed from beneath plaintiff's land by defendant, a special finding that 1,000 tons had been thus removed, on a verdict based on such finding, *held* to be manifestly against the weight of the evidence where it appeared that the evidence as to the amount of coal taken was based on surveys made by three different surveyors, two of whom were experienced mining engineers and the other not experienced in surveying mines, and that the jury accepted the survey by the latter, which appeared inaccurate on account of the instruments used.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

**Lillie Callahan, Administratrix, Plaintiff in Error, v.
Illinois Central Railroad Company, Defendant in
Error.**

1. TRIAL, § 191*—*rule in passing on motion for directed verdict.* When a motion for a peremptory instruction is made by defendant, the motion should be allowed if the court is of the opinion that in case a verdict is returned for plaintiff it must be set aside for want of any evidence in the record to sustain it; but the motion should be denied if the court is of the opinion that there is evidence in the record which, standing alone, is sufficient to sustain such a verdict, but that such verdict, if returned, must be set aside because against the manifest weight of all the evidence.

2. MASTER AND SERVANT, § 770*—*when direction of verdict improper.* In an action against a railroad company to recover for the death of plaintiff's intestate, alleged to have been caused by failure of defendant to properly equip its cars with automatic couplers, the giving of a peremptory instruction for defendant *held* error, where the testimony of two eyewitnesses showed that deceased was on the ladder of the rear car when making a running switch and that he made several unsuccessful attempts to lift the coupling pin with the lever and that he then got down to lift the pin with his hands.

3. TRIAL, § 197*—*what may not be considered in ruling on motion for directed verdict.* In ruling on a motion for a directed verdict for defendant, the fact that two of plaintiff's eyewitnesses did not agree in every particular, or that one of them had a better opportunity for seeing what occurred than the other, cannot be considered.

Error to the Circuit Court of Marion county; the Hon. THOMAS M. JETT, Judge, presiding. Heard in this court at the October term, 1913. Reversed and remanded. Opinion filed May 1, 1914. Rehearing denied and opinion modified October 28, 1914.

BUNDY & WHAM and NOLEMAN & SMITH, for plaintiff in error.

W. W. BARR and KAGY & VANDERVORT, for defendant in error; W. S. HORTON, of counsel.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Callahan v. Illinois Central R. Co., 190 Ill. App. 569.

MR. JUSTICE HARRIS delivered the opinion of the court.

The declaration in this case consists of two counts. The first count declared upon the statute of the United States, under and by which it became the duty of the defendant in error to equip all its cars, in moving interstate traffic, with couplers coupling automatically by impact so that the same may be uncoupled without the necessity of a man going between the cars, and not to haul or permit to be hauled or used on its said railroad any cars, in moving interstate traffic, not so equipped.

The second count is the same as the first count, except that it declared upon the statute of the State of Illinois, under and by which statute the defendant in error was, in compliance with its duty, to equip its said cars, engaged in traffic within the State of Illinois, with an automatic coupler, the provision being practically the same as under the statute of the United States; and in both of said counts it is averred that plaintiff's deceased, Frederick J. Callahan, while engaged with his assistants in the line of his employment in making a running switch near the station of Sandoval in said Marion county, by reason of the coupler upon said cars not being in compliance with the statute of either the State of Illinois or the United States, was injured, from which injury death followed; damage to the plaintiff and next of kin in the sum of ten thousand dollars. Plea of the general issue was filed to this declaration, a trial followed, and at the close of the evidence offered for the plaintiff a motion was made by the defendant in error for a peremptory instruction to find for the defendant in error, which was by the court sustained, instruction given and verdict returned accordingly.

Therefore the question to be determined by this court from an examination of the evidence offered and the law, was the giving of the peremptory instruction error?

The law upon this subject is laid down in this State in the case of *Libby, McNeill & Libby v. Cook*, 222 Ill. 213, in the following language: "When a motion for a peremptory instruction is made by the defendant, if the court is of the opinion that in case a verdict is returned for the plaintiff it must be set aside for want of evidence in the record to sustain it, a verdict should be directed. If the court is of the opinion that there is evidence in the record which, standing alone, is sufficient to sustain such a verdict, but that such a verdict, if returned, must be set aside because against the manifest weight of all the evidence, then the motion should be denied."

The evidence in this case when considered under the law is that at the time in question Callahan was on the ladder of the rear car and made several attempts to get the pin with the lever but did not get it with the lever and got down to lift the pin with his hands. This is the substance of the evidence of two eyewitnesses. That these witnesses did not agree in every particular in their testimony or that one of the witnesses had a better opportunity for seeing what occurred than the other witness would not be proper to consider under the motion made.

It was a matter for the jury to determine from the evidence whether an attempt was made to lift the pin with the lever and that it did not lift it, and the coupler would not work, and if he did try to lift it and it did not work, under the authorities, the jury would have a right to find that the car was not equipped with the coupler or that the coupler was not maintained in such a condition that the car could be uncoupled without plaintiff in error going between the cars in the performance of his duty as provided for by either the statute of the State of Illinois or of the United States. That Callahan when injured was in the line of his employment and in the performance of a duty imposed upon him by defendant in error is a conclusion that

Builders Supply & Coal Co. v. Eggmann, 190 Ill. App. 572.

might be drawn from the evidence in this case, and we think should have been submitted to the jury as a question of fact.

We find from the evidence in this case and under the law that the motion for peremptory instruction should have been denied and instruction refused. The judgment is reversed and the cause remanded.

Reversed and remanded.

Builders Supply & Coal Company, Appellee, v. R. J. Eggmann, Appellant.

(Not to be reported in full.)

Appeal from the City Court of East St. Louis; the Hon. ROBERT H. FLANNIGAN, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed May 1, 1914. Rehearing denied and opinion extended October 28, 1914.

Statement of the Case.

Petition filed in the City Court of East St. Louis, December 14, 1911, by the Builders Supply & Coal Company, a corporation, against R. J. Eggmann and Homer Crutchfield for a mechanic's lien against the west half of lot 15, Audubon place, East St. Louis. Later James F. Moorehead and others filed a petition in the same court for the same purpose and subsequently the East St. Louis Lumber Company filed a like petition. To these petitions additional defendants were afterwards added and a number of intervening petitions were filed by other claimants in said suits. At the September term, 1912, of said court, the three suits were consolidated and referred to the master to take the proofs and report the same and his findings. Objections were filed to the master's report which, being overruled, were later filed as exceptions

on the final hearing, when a decree was entered. From the joint decree, three separate appeals were taken, one by R. J. Eggmann, appellant in this case, one by James F. Moorehead and one by the East St. Louis Lumber Company.

This appeal is confined to the one taken by Eggmann. For the opinions of the Appellate Court on the other appeals see *Moorehead v. Eggmann*, post p. 578, and *East St. Louis Lumber Co. v. Eggmann*, post, p. 580.

On April 18, 1911, R. J. Eggmann, T. P. Eggmann and Horace J. Eggmann were associated together in the real estate business and in pursuance thereof bought vacant lots and built houses thereon, to be sold or rented. On that date they purchased vacant real estate which included that above described and gave a mortgage on the whole tract to William Urban for \$1,675. On June 27, 1912, when the amount due on the mortgage had been reduced to \$875, the balance was paid to Urban and the note assigned to Horace J. Eggmann, who at the time of the trial held it as trustee for the firm. On July 1, 1911, the following contract was entered into by appellant with Homer Crutchfield:

“EAST ST. LOUIS, ILL., July 1, 1911.

“This is an agreement by and between R. J. Eggmann and Homer Crutchfield as follows: The said Crutchfield agrees to purchase the west one-half of lot 15, Audubon place, Lansdowne, East St. Louis, Ill., of the said R. J. Eggmann for the sum of six hundred dollars (\$600); said amount of six hundred dollars to be taken out of a loan for twenty-five hundred dollars which said Eggmann agrees to make the said Crutchfield on a certain brick cottage as per plans submitted, same to be built on the above described lot, said house to be started within one week of this date and to be completed by September 1, 1911. All expenses of loan and insurance to be paid by Crutchfield. In case of shortage in funds, the said Eggmann agrees to take four hundred fifty dollars upon the completion of the loan and take back second mortgage for the sum of

one hundred fifty dollars on the above described property. Mortgages are to be made by Crutchfield and wife and upon the completion of said mortgages said Crutchfield agrees to make deed to said R. J. Eggmann as further security. It is agreed by and between the parties hereto that the net profits derived from the sale of this property or rental of same to be equally divided between the parties hereto. Nothing in this contract shall be construed to affect any of the stipulations in mortgage to be made. This agreement to remain in full force and effect for two years from this date and the said Eggmann is to collect all rents or monthly payments in case said property is rented or sold on monthly payments. Moneys so received are to take care of interest on mortgages and the payment of the said second mortgage should there be one, after which said money received is to be equally divided between the parties hereto.

R. J. EGGMANN."

This contract was not signed by Crutchfield, but he appears to have adopted the same as his own and proceeded to have the house provided for therein erected on the premises. He purchased the necessary materials therefor from appellee and other dealers and made contracts with mechanics for its construction, which was done with the knowledge and consent of appellant. The work was visited several times a week by T. P. Eggmann who testified that he acted as agent for appellant in that matter. After the house was substantially completed, it was discovered that the work and material were costing far in excess of the amount contemplated and further execution of the contract was abandoned. Among the claims growing out of the matter which were unpaid was one of appellee's for \$154.26 for material used in the building and \$59.35 for money advanced to pay for labor. There was also due and unpaid to J. Steinkopf the sum of \$148.59 for material furnished and labor done in plastering the house, which account was purchased by and assigned to appellee by Steinkopf and the assignment presented

to and accepted by Crutchfield. Appellee furnished the last of the material for which he claims on October 27, 1911, and his attorney testified that on November 25, 1911, he served on appellant a notice addressed to appellant and Crutchfield, showing there was \$303 due appellee. On December 14, 1911, appellee filed the petition above referred to, to enforce a lien against said premises, stating that during the month of July, 1911, Homer Crutchfield applied to petitioner for terms on which petitioner would furnish building supplies, lime and cement to be installed in the building then being erected on the property above described; that prices were given him and a contract agreed upon and material furnished to the amount of \$362.20, an itemized statement of said bill being affixed and attached to the petition and made a part of the same. It was also alleged that appellant was the owner of the property and knowingly permitted Crutchfield to improve it. The statement attached sets out in detail the material furnished amounting to \$154.26, the several amounts of cash advanced by petitioner for labor amounting to \$59.35, and the contract for material furnished and work done in plastering the house, amounting to \$148.59, making a total of \$362.20. The master in his report found, among other things, that appellee gave appellant a legal subcontractor's notice within sixty days after the last material was furnished; also that appellant and Crutchfield were partners and that such notice was unnecessary; that appellee was entitled to its lien for material and the Steinkopf claim assigned to it, but was not entitled to the lien for \$59.35 cash advanced by it; that Horace J. Eggmann held the mortgage assigned to him in trust for the firm and it should have been satisfied out of the proceeds of the parts of the lot already sold; that the mechanics' liens asked for were superior to any lien of said mortgage. On the final hearing the court entered a decree finding that a sufficient notice had

been given that appellee was entitled to a lien for the amount found by the master and that the mortgage assigned to Horace J. Eggmann, trustee, had merged with the fee and the lien thereby became released. The decree appeared to proceed on the theory that Crutchfield was a contractor and that those who contracted with him were subcontractors and that a subcontractor's notice was necessary but that as above stated, such notice had been given in this case.

Appellant contended that the proofs were too inconsistent with the petition and statement attached thereto to warrant the court in entering the decree; that the claim for cash advanced for labor included in appellee's petition and statement, was a fraud and defeated its right to a lien for any amount; that appellee was a subcontractor and the notice given by it was not properly signed and that there was not sufficient proof of its service or the delivery of the material claimed for; that, in any event, appellee could only recover for the material furnished and not for the Steinkopf bill for plastering assigned to it.

E. W. EGGMANN, for appellant.

JAY F. VICKERS, for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the

for work and materials could not be considered as a contractor within the meaning of the Mechanics' Liens Act.

2. MECHANICS' LIENS, § 56*—*when persons furnishing labor and materials not subcontractors.* Where a person who contracts with others for labor and materials to build a house is the purchaser of the lot on which the house is to be built and has no contract by which he is to build, or furnish work and materials for the vendor who retained the legal title, he is not a contractor within the meaning of the Mechanics' Lien Act (J. & A. ¶ 7139), and persons contracting directly with him to furnish labor and materials are principal contractors and not subcontractors so as to be required to give notice to owner.

3. MECHANICS' LIENS, § 35*—*when vendor of property cannot defend against lien.* Where a purchaser of a lot contracted with others for labor and materials to build a house thereon but had no contract with the vendor to do so, *held* that the fact that the legal title remained vested in the vendor could not be availed of by the latter as a defense to a suit for a lien on the property, where he authorized or knowingly permitted the purchaser to contract for the improvement.

4. MECHANICS' LIENS, § 134*—*right of assignee of claim to enforce lien.* Where a lien claimant takes an assignment of a lien claim of another with the consent of the owner of the premises he is entitled under section 22 of the Mechanics' Liens Act (J. & A. ¶ 7146) to include the assigned claim with his own in filing his petition for lien.

5. MECHANICS' LIENS, § 103*—*when excessive claim defeats lien.* The wilful and fraudulent filing of a claim for an excessive amount may, under some circumstance, defeat the allowance of a mechanic's lien.

6. MECHANICS' LIENS, § 103*—*when excessive claim will not defeat lien.* The fact that a lien claimant included in its statement money advanced for labor performed on the premises, *held* not to show any fraud was committed or contemplated by it which would defeat its right to the allowance of a lien for the amount to which it was entitled.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Moorehead v. Eggmann, 190 Ill. App. 578.

**James F. Moorehead, Appellant, v. R. J. Eggmann,
Appellee.**

(Not to be reported in full.)

Appeal from the City Court of East St. Louis, the Hon. ROBERT H. FLANNIGAN, Judge, presiding. Heard in this court at the October term, 1913. Reversed and remanded. Opinion filed May 1, 1914.

Statement of the Case.

This is a separate appeal from a decree entered in a mechanic's lien proceeding in the City Court of East St. Louis. Appellant's petition and two others were filed in that court and all three cases consolidated for hearing and tried as one case. From the joint decree three separate appeals were taken. The important facts and questions of law involved in all of the cases are considered by the Appellate Court on the separate appeal of *Builders Supply & Coal Co. v. Eggmann*, ante, p. 572, and the decision on that appeal is controlling upon several questions raised on this appeal.

The decree in the consolidated cases found that James F. Moorehead, the appellant here, contracted with Homer Crutchfield to do certain plumbing work and furnish certain materials for the improvement then being made by Crutchfield to the amount of \$203; that he had not served a subcontractor's notice on R. J. Eggmann, the owner, within the required sixty days; that he was entitled to recover said sum from Crutchfield, but not entitled to a lien. The court dismissed appellant's bill for want of equity.

One of the questions raised was whether there was a variance between the allegations of the petition and the proofs so as to defeat the allowance of a lien, it being urged that the petition proceeded on the theory that Crutchfield was original contractor and alleged that a subcontractor's notice had been served upon Eggmann as owner of the property.

DAN MCGLYNN, for appellant.

E. W. EGGMANN, for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

Abstract of the Decision.

1. MECHANICS' LIENS, § 193*—*when variance between allegations and proofs will not defeat lien.* Where a petition for a mechanic's lien proceeds upon the theory that petitioner was entitled to a lien as a subcontractor and the proof showed he was entitled to a lien as an original contractor, *held* that the variance would not defeat the allowance of a lien, where several cases presented by several petitions were filed in the same court for liens against the same property are consolidated for hearing and it became necessary for the court to determine the rights of all the parties.

2. MECHANICS' LIENS, § 190*—*effect of discrepancies in pleadings.* It would appear to be the theory of the law that when a petition for a mechanic's lien has been filed, under which the property in question can be subjected to the lien of those furnishing labor or materials for improvement thereon, that all parties having similar claims may present them to the court to be heard at the same time, and that the court having jurisdiction of the property as a fund will direct the satisfaction, not only of the debt of the original petitioner or claimant but also that of other claimants whose claims have been presented, and that discrepancies and irregularities in the petition or answers presenting the claims will be disregarded, provided the substance of the claim is set forth in some one or more of the petitions presenting such claims.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

East St. Louis Lumber Co. v. Eggmann, 190 Ill. App. 580.

East St. Louis Lumber Company, Appellant, v. R. J. Eggmann, Appellee.

(Not to be reported in full.)

Appeal from the City Court of East St. Louis; the Hon. ROBERT H. FLANNIGAN, Judge, presiding. Heard in this court at the October term, 1913. Reversed and remanded. Opinion filed May 1, 1914.

Statement of the Case.

This is a separate appeal taken by the East St. Louis Lumber Company from a Mechanic's lien decree entered by the City Court of East St. Louis. Complainant's petition and two other petitions were filed in that court for a lien against the same property and the suits were consolidated for hearing. Three separate appeals were taken from the decree, two of which have been previously considered by the Appellate Court. See *Builders Supply & Coal Co. v. Eggmann*, ante, p. 572; *Moorehead v. Eggmann*, ante, p. 578. A full statement of the facts leading up to the construction of the improvement, the filing of the petitions and the views of the Appellate Court as to questions of law concerning the transaction, and the decision on that appeal to the effect that the parties furnishing labor and materials were original contractors and not subcontractors, governs in considering the questions raised on this appeal.

Appellant in this case claimed a lien for lumber and mill work furnished on a contract with Crutchfield and made proof of his claim, but the court found against it on the theory that it was a subcontractor and had not filed the notice of its lien as required by law.

Appellee urged that the subcontractor's notice was not given in time and that the notice served upon him and set out in appellant's petition as a part thereof claimed a balance of \$815.13, when the amount should have been \$654.66, and that this excess in the claim

constituted a fraud in law making the whole claim nugatory.

WISE, KEEFE & WHEELER, for appellant.

E. W. EGGMANN, for appellee.

MR. JUSTICE HIGBEE delivered the opinion of the court.

Abstract of the Decision.

1. MECHANICS' LIENS, § 103*—*when excessive claim will not defeat lien.* The fact that a notice for a lien and also the petition contained an item for which no lien could be allowed, *held* not to render the whole claim void, where it appeared that the claimant believed he had a right to include it and that there was no attempt to perpetrate a fraud.

2. MECHANICS' LIENS, § 149*—*when suit to enforce lien commenced in time.* A suit for a mechanics' lien *held* to be commenced within the time which an original contractor could bring suit to enforce the lien, where it appeared that materials were delivered on the premises twenty days before the time of commencing the suit.

Hagen Paper Company, Defendant in Error, v. East St. Louis Publishing Company, Plaintiff in Error.

1. PLEADING, § 384*—*necessity of similiter.* Not error to proceed to trial without a *similiter* filed to the plea of general issue.

2. CORPORATIONS, § 763*—*when replication demurrable.* A replication to a special plea setting up that plaintiff, a foreign corporation, had not complied with the laws in this State in order to do business therein, *held* demurrable.

3. APPEAL AND ERROR, § 1681*—*when erroneous ruling on demurrer waived.* Error of court in overruling a demurrer to a defective replication cannot be availed of on review where the party demurring did not abide by the demurrer but proceeded to trial.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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4. APPEAL AND ERROR, § 1303*—*when judgment presumed sustained by the evidence.* Where the record states that evidence was introduced but fails to show what it was, it will be presumed that it was sufficient to sustain the judgment.

5. CORPORATIONS, § 710*—*when foreign corporation not doing business in this State.* Where a foreign corporation has no established place of business of any kind in this State and carries on no local business, but merely sells its merchandise through soliciting agents or drummers and delivers the same through common carriers in the ordinary course of business, such corporation is not transacting business in this State within the meaning of the statute requiring such corporations to comply with certain formalities before transacting business in this State.

Error to the City Court of East St. Louis; the Hon. ROBERT H. FLANNIGAN, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed July 28, 1914. Rehearing denied October 28, 1914.

JAY F. VICKERS, for plaintiff in error.

W. L. COLEY, for defendant in error.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

This was an action in assumpsit brought by the Hagen Paper Company, defendant in error, against the East St. Louis Publishing Company, plaintiff in error, to recover \$543.26 alleged to be due defendant in error on eight promissory notes, executed by plaintiff in error.

The declaration alleged that the Hagen Paper Company was a Missouri corporation; that on December 6, 1911, plaintiff in error made and delivered to it eight promissory notes, seven of which were for the sum of \$66.30 each and one for the sum of \$65.69; that they became due at various days mentioned in the declaration after the twenty-eighth of February, 1912; that all were payable at the office of the Hagen Paper Company, with interest at the rate of six per cent. per

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Hagen Paper Co. v. East St. Louis Pub. Co., 190 Ill. App. 581.

annum. The declaration also contained the usual common counts.

To this declaration plaintiff in error filed two pleas, one being the general issue and the other a special plea, alleging that defendant in error was a foreign corporation organized for profit and existing under the laws of the State of Missouri; that it was not a railroad or telegraph company, nor in the banking, insurance or money loaning business and was not engaged in interstate commerce; that the merchandise for which the suit was brought was sold to plaintiff in error and bought by it within the State of Illinois; that defendant in error had not complied with the laws of the State of Illinois authorizing it to do business in this State, and at the time of the commencement of this suit had no certificate of authority issued to it by the Secretary of State, entitling it to transact business as provided by statute.

To the special plea defendant in error filed the following replication: "And plaintiff as to the special plea of *nul tiel corporation* by the defendant pleaded, says *precludi non*, because it says that the declaration in this cause by plaintiff filed, shows first—that plaintiff is a Missouri corporation, and second—that the action is based upon the eight notes executed by the defendant and made payable to the order of the plaintiff at its office, and plaintiff says that its office is in the City of St. Louis and State of Missouri and not within the State of Illinois, and that it appears from the face of the declaration by the plaintiff pleaded that the contract is a contract made by defendant with plaintiff in the State of Missouri, and therefore the plaintiff should not be precluded from maintaining its action in the matter as aforesaid, and of this it puts itself upon the country."

A general demurrer was filed by plaintiff in error to this replication, which was overruled by the court. The record shows that there was an amended special

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plea filed, by plaintiff in error, after the above replication was filed, which set up in a different form substantially the same defense as that relied on in the original special plea. As it appears from the record that the demurrer to said replication was overruled sometime after the amended special plea was filed, we take it for granted that the replication, which applied in like manner to the amended as to the original special plea, was treated by the court as having been filed to the amended plea. After demurrer to said replication was overruled, the case proceeded to trial before a jury, evidence was heard and a verdict rendered in favor of defendant in error for \$543.26. A motion for a new trial by plaintiff in error was overruled and judgment entered for the amount of the verdict.

Some question is raised as to whether a *similiter* was filed to the general issue filed by plaintiff in error, and we fail to find the same in the record. The record does contain the statement, however, that: "On the 22nd day of November, 1912, comes the parties and the issues being joined, the court orders a jury." The *similiter* to the general issue must have been treated by the court and the parties as having been filed, and the trial was evidently had upon that theory. But regardless of the showing of the record, it was not error to proceed to trial without a *similiter*. *Gillespie v. Smith*, 29 Ill. 473; *McCoy v. World's Columbian Exposition*, 87 Ill. App. 605; *Supreme Court of Honor v. Barker*, 96 Ill. App. 490.

The amended special plea of the plaintiff in error alleged, as a defense to this action, that the merchandise for which the suit was brought was sold to plaintiff in error and bought by it within the State of Illinois, and that defendant in error was therefore transacting business in this State without complying with the laws of this State authorizing it as a foreign corporation to do so, and that therefore the court was without jurisdiction to entertain its suit to collect said debt.

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The replication admitted that defendant in error was a Missouri corporation and did not deny that it had not taken the necessary steps required by statute to permit it to transact business in this State, but stated as the basis of defendant in error's right to maintain its action in this State that it had its office in the City of St. Louis in the State of Missouri, and that it appeared from the face of the declaration that the contract between the parties was made in the State of Missouri.

Plaintiff in error insists that in overruling the demurrer to this replication the court committed a material error, for which the judgment should be reversed. The replication in question evidently sought to take advantage of a state of facts which, if true, would have constituted a good and sufficient reply to said plea of plaintiff in error, but in technical construction it failed to meet the statements of the plea in such a way as to constitute a good reply and the demurrer to it might properly have been sustained. The record shows, however that plaintiff in error did not abide by its demurrer, but that it proceeded to trial and that counsel for plaintiff in error took part in the trial. Plaintiff in error also failed to assign as error the action of the court below in overruling its demurrer to said replication. Under these circumstances, plaintiff in error cannot be permitted to take advantage of the action of the court below in overruling said demurrer as a ground for the reversal of the judgment herein, even if such ground could be considered sufficient to warrant a reversal thereof.

The record in this case states that evidence was introduced on the part of defendant in error, but fails to show what that evidence was, the same being wholly admitted. It must therefore be presumed that the evidence was sufficient to sustain the judgment in favor of defendant in error. We may say, however, that the abstract contains what purports to be the evidence introduced by defendant in error upon the trial and,

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from it, it appears that defendant in error obtained its orders for goods in Illinois by sending out soliciting agents from its house in St. Louis, Missouri, and that the order for the goods for which the notes in question were given was telephoned by plaintiff in error to one of these agents of defendant in error and the goods were shipped by the latter from its said place of business in St. Louis. It has been repeatedly held in this State that where a foreign corporation has no established place of business of any kind in this State, and carries on no local business but merely sells its merchandise through the instrumentality of soliciting agents or "drummers" and delivers the same through common carriers in the ordinary course of business, such corporation is not transacting business in this State within the meaning of the statute, requiring foreign corporations desiring admission into the State of Illinois, for the purpose of transacting business or exercising their corporate powers of franchises, to make application to the Secretary of State and comply with certain formalities and conditions prescribed by the law. *Yost Elec. Mfg. Co. v. Cavanaugh-Darley Co.*, 147 Ill. App. 418; *Lehigh Portland Cement Co. v. McLean*, 149 id. 360; affirmed in 245 Ill. 326; *John Spry Lumber Co. v. Chappell*, 184 Ill. 539.

The judgment of the court below in this cause will be affirmed.

Affirmed.

**M. W. Cockrum, Appellee, v. Theodore C. Keller,
Appellant.**

1. **MINES AND MINERALS, § 34a***—*when finding as to fraud and deceit in sale of coal rights warranted by evidence.* In an action for fraud and deceit practiced by defendant on plaintiff, whereby the latter was induced to sell the coal under his lands for less than it was worth, *held* that a finding for plaintiff was sustained by the evidence.

2. **FRAUD, § 58***—*when action lies for fraud and deceit.* A party induced by the fraud of another to enter into a written contract may bring an action for fraud and deceit, though the contract is under seal.

3. **FRAUD, § 84***—*sufficiency of declaration in action for fraud and deceit.* A declaration in an action for fraud and deceit in inducing plaintiff to sell the coal under his lands, *held* to state with particularity the fraudulent representations and deceits relied upon, and therefore not defective as stating conclusions only.

4. **FRAUD, § 86***—*when variance between declaration and proofs not fatal.* In an action for fraud and deceit in inducing plaintiff to sell coal under his land for an inadequate price, *held* there was no fatal variance between the declaration and proofs, where the evidence sustained the charges substantially as laid in the declaration.

5. **FRAUD, § 125***—*when damages not excessive.* A judgment in favor of plaintiff for \$3,800 for fraud and deceit in inducing plaintiff to sell coal beneath his land at an inadequate price, *held* not excessive where the evidence tended to show that the coal rights were worth more than the sum paid, together with the amount of the verdict.

Appeal from the Circuit Court of Franklin county; the Hon. ENOCH E. NEWLIN, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed July 28, 1914. Rehearing denied October 28, 1914. *Certiorari* denied by Supreme Court (making opinion final).

UNDERWOOD & SMYER and HART & WILLIAMS, for appellant; CHARLES R. YOUNG and MOSES PULVERMAN, of counsel.

DILLON & STRICKLAND and LAYMAN & JOHNSON, for appellee.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Cockrum v. Keller, 190 Ill. App. 587.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

In this suit appellee claimed \$16,000 damages on account of fraud and deceit practiced on him by appellant, whereby he was induced to sell the latter the coal under three hundred acres of land in Franklin county, Illinois, at \$7.50 an acre, when it was really worth a much greater sum.

The declaration, which consisted of three counts, alleged that appellant, a coal operator, desired to buy a large body of coal, oil, gas and other minerals underlying the surface of the lands of appellee and other lands contiguous thereto; that he secured permission of appellee and certain others to drill test or prospect holes on their respective lands; that he did drill said holes on the lands of each of said parties and secured cores of coal which demonstrated to him the fact that the stratum of coal underlying the surface of said land was eight feet six inches in thickness and worth at least \$50 an acre, which facts appellant withheld from appellee; that for the purpose of cheating and defrauding appellee, appellant represented that the stratum of coal was less than eight feet in thickness and contained a parting of slate, rock and other foreign substance which made it practically worthless for mining purposes, and that in no event would it be worth to exceed \$7.50 an acre; that after appellant had prospected said coal by drilling, he showed appellee three cores of coal purporting to be cores taken from the land of Hill, Montgomery and appellee respectively, and represented to appellee that said cores naturally and properly contained a parting of slate, rock, dirt or other foreign substance; that appellant knew at the time he made such representations as aforesaid that they were false and untrue; that appellee did not know the falsity of such representations but relied upon the truth of the statements made by appellant, and on November 6, 1905, sold him the coal, oil, gas and other

minerals underlying his premises for the sum of \$7.50 an acre.

The case was submitted to a jury which returned a general verdict in favor of appellee for \$3,800. At the same time special findings were asked which were also made by the jury. Upon the return of the verdict, appellant insisted that the special findings of fact, especially the third made by the jury, were inconsistent with the general verdict and should control the same, and moved that judgment be entered in favor of appellant and against appellee for costs, which motion was granted by the court and judgment entered accordingly. From that judgment an appeal was taken to this court, where it was held that the special findings of fact were not inconsistent with the general verdict and should not control the same, and the judgment of the trial court was reversed and the cause remanded with directions to that court to enter a judgment in favor of Cockrum, the plaintiff below, upon the general verdict, for the sum of \$3,800 and costs. *Cockrum v. Keller*, 173 Ill. App. 245. Appellant was granted a certificate of importance by this court and perfected an appeal to the Supreme Court, where it was decided that this court was correct in holding that the special findings were consistent with the general verdict and that such special findings did not control the general verdict in favor of Cockrum. But the judgment was reversed and the cause remanded to this court with directions to reverse the judgment of the trial court and remand the cause, with directions to that court to overrule the motion for judgment on the special findings and to entertain a motion for a new trial if one should be made, and if such motion should be overruled, to enter judgment on the general verdict. 258 Ill. 276. Thereafter the cause was remanded to this court and by this court to the trial court where a motion for a new trial was entered, and the same having been overruled, judgment was rendered against

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appellant Keller for \$3,800 and costs, and from that judgment this appeal is prosecuted.

The reasons assigned and argued by appellant for the reversal of this judgment are: That the general verdict upon which the judgment was entered was not sustained by the proofs; that a court of law had no power to investigate the question as to whether there were fraudulent representations concerning the nature and value of the consideration of the contract between the parties; that the declaration failed to state a cause of action and such defect was not cured by the verdict; that there was a variance between the allegations of the declaration and the proof, and the damages awarded were excessive. For a general statement of the facts, reference is made to the opinion of this court when the case was here on the former occasion referred to. It may be further said that no question was raised but that the core of coal as shown to appellee in the box contained a parting of seven inches of blue band, slate or other foreign substances which, if found in the vein of coal, would greatly injure if not practically destroy its value for mining purposes, and that appellant stated that the land was not a good coal proposition. Appellant, however, insists that the evidence does not show that such a parting as that disclosed by the core of coal in question did not actually exist as the core was taken from the drill; also that the proof fails to show that he was instrumental in tampering in any way with the core of coal as it came from the vein.

It appeared from the proofs that prior to the date of the drilling mentioned, appellee had given a written option for the sale of a greater portion of the premises in question to a nephew who had transferred it to Messrs. Fitzgerald, Stamper and Espy, and that these three had subsequently transferred the option to appellant; that when some three feet of coal had been bored through and the drillers announced that fact, appellant refused to permit Fitzgerald, Stamper and

Espy to be present when the test was completed and the core taken out; that it was, however, finally agreed after much wrangling that Espy should be present when the drill went through the coal and thereafter the drill was sunk through the vein and it was found there were nine feet one inch of coal with three-fourths of an inch of blue band; that three feet of the core had been taken out on one day and the balance on the second day when Espy was present; that when the whole core was exhibited to appellee it showed a parting about eighteen inches from the bottom in the stratum of coal, consisting of blue band, slate or other impurities, seven inches thick and this parting had been inserted in the core after it had been removed from the vein. That this foreign substance was inserted in the core after it came from the vein is denied by witnesses who testified on behalf of appellant. It was therefore for the jury, who heard the testimony and saw the witnesses on the stand, to determine what weight should be given to the testimony of the several witnesses and which were more worthy of credence, and to decide from all the evidence in the case the true state of facts. In deciding the facts, the jury, in addition to the general verdict in favor of appellee, made the following special findings: "Do you find that defendant personally directed or authorized any tampering or interfering with or changing the core taken out by drilling on the land of said plaintiff? Ans. Yes.

"Do you find that defendant personally made to plaintiff personally any false statements concerning coal underlying land then owned by plaintiff? Ans. Yes."

From an examination of the record we find that the facts disclosed therein would not warrant us in disturbing the verdict of the jury. After the expiration of the option above referred to and subsequently to the controversy over the core of coal taken from the

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vein, appellee entered into a written contract, under seal, with appellant to sell him the coal, oil, gas and other minerals underlying said premises, consisting of three hundred acres, for \$2,200, and also to sell him the fee to a portion of said premises for \$5,400, and this contract appears to have been carried out by the parties thereto. It is contended by appellant that as this contract is under seal, appellee cannot now attack the consideration at law but that his remedy, if any he has, is in equity to set aside the contract. It does not follow, however, from the fact that appellee had the right to proceed in equity to set aside the contract in question, that he could not sue at law to recover for the fraud he claims to have been perpetrated upon him by appellant. In 14 Am. & Eng. Ency. of Law (2nd Ed.) at page 167, the following statement is made: "It has sometimes been contended that when a party has been induced to enter into a contract by the fraud of the other party, his only remedy is to rescind the contract and sue to recover what he has parted with or set up the fraud as a defense, if he is himself sued on the contract. It is thoroughly well settled, however, that he has an election of remedies, and that, while he may rescind, he is not bound to do so but may hold the other party to the contract, and sue him to recover the damages which he has sustained in consequences of the fraud." Our own courts have also had something to say upon this subject in conformity with the doctrine above expressed. In *Antle v. Sexton*, 137 Ill. 410, where it was claimed that fraud and deceit had been used by appellant to induce appellees to enter into a written contract for the sale of certain standing timber, it was said: "Surely, where a misrepresentation is made as to a material fact, and such misrepresentation is made knowingly, and for the express purpose of deceiving and defrauding, and the party injured relies upon the statements made, and under circumstances which would induce a reason-

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ably prudent man to so rely, there must be a right of action at law for fraud and deceit. * * * The action was not brought upon the contract, but upon false representations and deceit, used to induce the plaintiff to enter into the contract, whereby they have been damnified. It is well settled that such an action will lie though the parties may have entered into a written agreement, and though in such agreement there be a warranty or stipulation upon the point covered by the misrepresentations." The Appellate Court of the First District said, in discussing a case brought to recover damages for fraud and deceit, alleged to have been used by one of the parties in the sale of a farm, in *Williams v. Wilson*, 101 Ill. App. 541: "This is what is known as an action for deceit. It is not based upon the deed given nor upon the contract entered into, but upon alleged fraud by which appellant was induced to enter into the contract ultimated by mutual deeds. Such an action will lie although the parties have entered into a written agreement, thus merging therein the previous negotiations, because the complaint of the plaintiff is of fraudulent practice by which he was persuaded to contract; and such action may be maintained although there be a written warranty or stipulation upon the point covered by the misrepresentations complained of." It is further claimed by appellant, in this connection, that the action for fraud and deceit could not be maintained for the reason that both parties had equal means of knowledge of the matters concerning which the misrepresentations are said to have been made. If, however, the proof introduced by appellee is to be relied upon, he did not have equal means of knowledge with appellant for knowing the true condition of the vein of coal and upon this subject the jury have decided, as they had a right to, in favor of appellee.

The contention of appellant that the declaration failed to state a cause of action is based upon the

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claim that the declaration does not allege substantial facts, essential to a right of action but states conclusions only. It is true, as stated by appellant and held in *Weigand v. Cannon*, 118 Ill. App. 635, that facts from which the legal conclusion of fraud is to be drawn, must be set up. This is required in order that the party charged may be notified of the evidence he is expected to meet and the Court in that case says: "A plea of fraud in procuring the execution of a written instrument must set out the facts from which the legal conclusion of fraud is to be drawn, in order that the party may be notified of the evidence he is expected to meet. It is not sufficient to allege fraud generally for the purpose of assailing a transaction on that ground, but the complaining party must state in his pleading and prove on the trial the specific acts or facts relied on as establishing the fraud." It appears to us, however, that the declaration in this case stated with particularity the fraudulent representations and deceits relied upon by appellant and that appellant was notified thereby explicitly of the charges made against him, and which he would be expected to meet.

The claim of appellant that there was a fatal variance between the allegations of the declaration and the proofs is based upon the fact that the declaration filed in the case alleged that appellee's land was "practically free" from foreign or faulty substance and was of extra fine quality, when the proof offered by appellee shows that there was a parting of at least three quarters of an inch of faulty substance. In *Ladd v. Piggett*, 114 Ill. 647, which was an action for fraud and deceit, alleged to have been practiced by the defendant in the sale and exchange of property, it is said: "Plaintiff is, perhaps, not bound to prove the representations precisely as alleged, but he must prove the substance or the material parts of such representations, and more strictness than that the law does not

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require.” In *Endsley v. Johns*, 120 Ill. 469, which was also an action for fraud and deceit, it is said to be true, “that the plaintiff might recover although he did not prove the misrepresentations precisely as laid, nor in all the different forms as laid; but it was required of him to prove substantially the material allegations.” In this case appellee introduced proof to sustain the charges substantially, if indeed it could be said not to be precisely, as laid in the declaration, and appellant’s objection on this score does not appear to us to be well founded.

The last contention of appellant is that the damages awarded are excessive and could not have been legally arrived at on any theory of the case, based upon the evidence. In discussing this question, appellant argues that one hundred and sixty acres of appellee’s land was sold to appellant in fee and as part of the consideration for that sale, appellant agreed to and did pay appellee \$2,200 for the coal underlying the whole tract of three hundred acres, and says that appellee was not entitled to any damages because he sold both his land and his coal at an acceptable price and was fully paid therefor. The defect in this position is that it takes no account of the fraud and deceit alleged to have been exercised by appellant which led appellee to believe that the vein of coal underlying the land had a fault in it, thus rendering it of little value. The fact that part of the land was sold in fee could not affect the amount of damages to be recovered by appellee as, in fixing the value of the fee, he must have estimated the value of the underlying coal at the small amount it was supposed to be worth by reason of the fault it was said to contain. The amount of the verdict and judgment in favor of appellee was \$3,800. There was proof tending to show that the coal rights were actually worth as much as \$25 an acre, which would be \$7,500 for the whole tract. If to the amount of the verdict there be added the \$2,200 received by appellee

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for his coal rights, the sum will be \$6,000, which is considerably less than some of the proof shows it to have been worth, and therefore the verdict cannot properly be considered as excessive.

The judgment of the court below will be affirmed.

Affirmed.

**Emma Belle Christian, Appellant, v. Melvin C. Heuter,
Appellee. .**

(Not to be reported in full.)

Appeal from the Circuit Court of Bond county; the Hon. GEORGE A. CROW, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed July 28, 1914. Rehearing denied October 28, 1914.

Statement of the Case.

Petition by Emma Belle Christian, administratrix of the estate of George W. Christian for a citation against MELVIN C. HEUTER to require him to account for the assets of a partnership in which the deceased and the defendant were copartners in the former's lifetime. Defendant answered the petition and afterwards made his report; showing the amounts received and the amounts paid out in settling the partnership, from which it appeared that he had paid out \$372.04 in excess of his receipts. Exceptions were filed to the report and upon the hearing the petition was dismissed by the court. From the order dismissing the petition, the administratrix appeals.

HOMER L. FAIRCHILD and JOHN A. BINGHAM, for appellant.

C. E. Cook, for appellee.

Webb v. Hunt, 190 Ill. App. 597.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

Abstract of the Decision.

1. PARTNERSHIP, § 279*—*when judgment against surviving partner payable out of firm assets.* Where a note was given by a partnership and after the death of one of the partners it was reduced to judgment against the surviving partner alone, *held* that the indebtedness expressed in the note did not merge in the judgment so as to become an individual debt of the surviving partner, and thus prevent him, when settling up the business of the partnership, from paying the claim out of the firm assets.

2. PARTNERSHIP, § 318*—*what not continuance of business by surviving partner.* A surviving partner cannot be charged with having continued to carry on the business of the partnership after the death of his copartner where it appeared that no business was done by him other than selling the firm property and collecting the accounts.

3. PARTNERSHIP, § 314*—*when acts of surviving partner not fraudulent.* Where a surviving partner in settling the business of a copartnership, paid a firm creditor a portion of its claim with the understanding such payment was not to be considered in full if there should be a surplus remaining after the payment of the debts, *held* that the fact that he thereafter paid such creditor the balance of its debt did not constitute a fraud upon the firm creditors or the creditors of the estate of the deceased partner, since the arrangement was simply to pay a debt of the partnership; and the payment was made in accordance with the law as well as good business.

**Allie Webb, Administratrix, Appellee, v. A. A. Hunt,
Appellant.**

(Not to be reported in full.)

Appeal from the Circuit Court of St. Clair county; the Hon. WILLIAM E. HADLEY, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed July 28, 1914. Rehearing denied October 28, 1914.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Webb v. Hunt, 190 Ill. App. 597.

Statement of the Case.

Suit in assumpsit by Allie Webb, administratrix of the estate of Reese Webb, against A. A. Hunt to recover \$300 alleged to have been received by defendant for said estate. To reverse a judgment entered in favor of plaintiff on a directed verdict for \$293, defendant appeals.

The facts showed that deceased at the time of his death, was a partner with one Williams in running a saloon, and that shortly afterwards plaintiff called upon defendant, who was an attorney, in regard to settling her husband's estate; that he advised her that it could be settled without going into court and she employed him to look after the matter. After consultation with Williams and plaintiff, the defendant sold the interest plaintiff's husband had in the saloon to Williams for \$300, and that amount was paid over to defendant who thereafter refused to pay the whole amount to plaintiff, claiming he was to deduct therefrom \$100 for attorney's fees, and also pay the funeral expenses of deceased and \$7 to one McCullough. Afterwards plaintiff took out letters of administration on her husband's estate and brought this suit.

CLYDE D. MILLER, for appellant.

SCHAEFER & KRUGER, for appellee.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

Abstract of the Decision.

1. EXECUTORS AND ADMINISTRATORS, § 90*—*right of administratrix to sue for money received from sale of partnership interest.* An administratrix in her official capacity has the right to sue a person for money received by him in selling with her consent, the interest of her deceased husband in a copartnership, and is not required to first compel an accounting by the surviving partner.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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2. EXECUTORS AND ADMINISTRATORS, § 86*—*right of set-off in suit for collection of assets.* Where an attorney employed by a widow to settle her husband's estate out of court sold the husband's interest in his partnership business and received the money, but refused to turn over the money to her without first deducting attorney's fees and other items, and the widow thereafter took out letters of administration and brought suit as administratrix for the money, *held* that she was entitled to recover without any deduction for attorney's fees whether she had previously agreed to pay them or not, for the reason that as administratrix she held title to the property for the estate.

**Charles Gibson, Appellee, v. Wasson Coal Company,
Appellant.**

(Not to be reported in full.)

Appeal from the Circuit Court of Saline county; the Hon. A. W. LEWIS, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed July 28, 1914. Rehearing denied October 28, 1914. *Certiorari* denied by Supreme Court (making opinion final).

Statement of the Case.

Action by Charles Gibson against the Wasson Coal Company to recover for personal injuries sustained by plaintiff while employed in defendant's mine. The declaration charged defendant with a violation of its duty under clause 4 of section 21 of the Miners' Act (J. & A. ¶ 7495) in substance, as follows:

That on a certain day the defendant was operating a coal mine in the county of Saline in which there were entries, and one entry in particular being the second north entry off of the main east entry; that plaintiff was employed by defendant in said mine as a machine runner, operating a machine undercutting coal in said entry. That it was the duty of defendant to employ a competent mine examiner and cause him to visit

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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said mine and make a careful examination of all places where plaintiff was expected to pass or work, observe whether there were any unsafe conditions in the rooms or roadways, and when any unsafe condition was observed in a working place to place a conspicuous mark thereat as notice to all men to keep out, and report his findings to the mine manager; said examination to be made each morning before permitting the men to enter the mine to work therein.

That on said day plaintiff was running a machine in the said entry, and therein was a pile of gob four feet wide, three feet high, extending from the right rail of the track in said entry to the right rib of coal, located about eight feet from the face of the coal; that said gob formed an unsafe condition in plaintiff's working place in that lumps of coal could roll therefrom into the frame of said machine, and also by reason of its being located so near the face of the coal as not to leave a clear space sufficient between the pile of gob and the face of the coal for the reasonably safe operation of said machine; that said unsafe condition could have been discovered by said mine examiner upon a reasonably careful examination on the morning of the day of the injury.

That defendant wilfully failed to cause said examiner to visit and inspect plaintiff's said working place and observe said unsafe condition and place a conspicuous mark thereat as a notice to plaintiff to keep out, and report his findings to the mine manager, and make a daily report in a book kept for that purpose. That defendant failed to cause the mine manager to visit and examine said working place on that morning or as often as practicable for some time prior thereto and failed to see that said dangerous place was properly marked and danger signals displayed thereat.

That while the plaintiff was operating the machine at his working place in the usual course of his employment on the day aforesaid by reason of defend-

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ant's wilful failure aforesaid, a lump of coal rolled off of said pile of gob into and through the frame of said machine and came in contact with plaintiff's foot, threw him against and into the bits of said machine and his leg was cut off about four inches below the knee and otherwise injuring him, and alleging damages in the amount of \$1,999.99.

To these four counts of the declaration, the plea of the general issue was filed. Plaintiff had a verdict and judgment for \$1,350. To reverse the judgment, defendant appeals.

WHITLEY & COMBE, for appellant; MASTIN & SHERLOCK, of counsel.

W. F. SCOTT, for appellee.

MR. JUSTICE HARRIS delivered the opinion of the court.

Abstract of the Decision.

1. MINES AND MINERALS, § 175*—*when finding as to proximate cause of injury sustained by evidence.* In an action for personal injuries sustained by a miner alleged to have been caused by failure of the mine examiner to mark a pile of gob as dangerous, *held* that the question whether the violation of the statute was the proximate cause was properly submitted to the jury, and that the verdict for plaintiff was sustained by the evidence.

2. TRIAL, § 197*—*what considered in ruling on motion for directed verdict.* On motion for a directed verdict in favor of defendant, the court cannot consider inconsistent statements made by witnesses out of court.

3. TRIAL, § 216*—*matters considered in ruling on motion for directed verdict.* It is not for the court, upon a motion for a directed verdict, to weigh the evidence and determine where the preponderance lies.

4. MINES AND MINERALS, § 185*—*direction of verdict.* In determining whether it should be submitted to the jury as a question of fact that the violation of a mining statute was the proximate

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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cause of an injury, the court is governed by the same rule of law as applies to any other material issue.

5. MINES AND MINERALS, § 153*—*when testimony of mine examiner inadmissible.* In an action to recover for personal injuries sustained in a mine, alleged to have been caused by failure of the mine examiner to mark the unsafe condition of the mine, where the mine examiner was asked the question: "Tell the jury now what condition you found that entry in as to being safe or otherwise," *held* that an objection to the question was properly sustained for the reason that to permit the witness to give his opinion on such matter would improperly usurp the functions of the court and jury.

6. NEGLIGENCE, § 250*—*when modification of instruction harmless.* A modification of an instruction on the question of proximate cause by striking out the word "direct" and inserting the word "proximate," *held* not error, it also appearing that the party complaining had the benefit of the word "direct" in its other instructions given.

Joseph Synkus, Appellee, v. Big Muddy Coal & Iron Company, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Jackson county; the Hon. A. W. LEWIS, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed July 28, 1914. Rehearing denied October 28, 1914.

Statement of the Case.

Action by Joseph Synkus against the Big Muddy Coal & Iron Company to recover for injuries received by plaintiff on account of an explosion of gas in defendant's mine. The case was submitted to the jury on two counts in the declaration. One count was based upon a violation of clause "b" of section 24 of the Miners' Act (J. & A. ¶ 7498). The other was a common-law count averring an unsafe place to work, a

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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negligent order of defendant's foreman and plaintiff's reliance upon the promise made by the foreman of want of danger, etc. Both counts alleged that defendant had rejected the terms and provisions of the Workmen's Compensation Act of 1911 (J. & A. ¶¶ 5449 *et seq.*). To the declaration defendant filed the plea of general issue. Plaintiff had verdict and judgment for three thousand dollars and a motion for a new trial was overruled. To reverse the judgment, defendant appeals.

Defendant urged as ground for reversal: That defendant was operating at the time of the injury under the Workmen's Compensation Act of 1911; that the court erred in admitting certified copies of letters and notices to the Secretary of State of Illinois, and to the State Bureau of Labor Statistics; that defendant was not deprived of its common-law defenses; that the court erred in instructing and refusing to instruct the jury and in rejecting evidence offered by defendant.

DENISON & SPILLER and JOHN M. HERBERT for appellant; MASTIN & SHERLOCK, of counsel.

THOMAS R. MOULD and SCHWARTZ & HAYS, for appellee.

MR. JUSTICE HARRIS delivered the opinion of the court.

Abstract of the Decision.

1. WORKMEN'S COMPENSATION ACT, § 2*—*duration of election.* Under the provisions of the Workmen's Compensation Act of 1911 (J. & A. ¶¶ 5449 *et seq.*), where an employer files the proper notice rejecting the provisions of the act the notice stands as a negative election until it is withdrawn, and the fact that the employer does not give a further notice, sixty days previous to the first day of the following year, does not automatically constitute an election by him to accept the provisions of the act.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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2. WORKMEN'S COMPENSATION ACT, § 2*—*burden of proving election to come under act.* In an action against an employer for personal injuries, where the employer claims to have elected to come under the Workmen's Compensation Act of 1911, the plaintiff has the burden of proving that defendant had rejected the act by showing that the proper notice had been filed with the Bureau named in the act.

3. WORKMEN'S COMPENSATION ACT, § 2*—*when employer deprived of common-law defenses.* An employer who has elected to reject the provisions of the Workmen's Compensation Act of 1911 is deprived of his common-law defenses though the employee has not elected to come under the act.

4. WORKMEN'S COMPENSATION ACT, § 2*—*evidence admissible to prove election.* In proving that an employer elected to reject the provisions of the Workmen's Compensation Act of 1911, a copy of the notice of election certified to by the person charged with the custody of the original is admissible as the best evidence.

• **Alfred N. Deming, Administrator, Appellee, v. The Prudential Insurance Company of America, Appellant.**

(Not to be reported in full.)

Appeal from the City Court of Herrin; the Hon. WILLIAM W. CLEMENS, Judge, presiding. Heard in this court at the October term, 1913. Affirmed. Opinion filed July 28, 1914. Rehearing denied and opinion modified October 28, 1914.

Statement of the Case.

Action by Alfred N. Deming, administrator of the estate of Claud Deming, deceased, against The Prudential Insurance Company of America to recover the amount of two life insurance policies issued by defendant on the life of plaintiff's intestate. One of the policies was for \$100 and the other for \$500.

The declaration contained two counts, each declaring on one of the policies and setting it out in full. To the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Deming v. The Prudential Ins. Co., 190 Ill. App. 604.

declaration five special pleas were filed. The first averred that by the policy the liability of defendant was limited to a return of the premiums paid, if the insured was not in sound health. Pleas 2, 3 and 4 set forth certain questions and answers thereto contained in the application for insurance, with reference to the health of the insured. The fifth plea set out a question and answer in the application as to whether either parent or a brother or sister died of consumption, and averred that the answers were false. To the first plea a replication was filed stating that defendant's agent was informed by the insured when the application was made that he was in sound health. The replication to pleas 2, 3, 4 and 5 stated that the answers relied upon in said pleas as a defense were written by defendant's agent without the knowledge and consent of the insured. Plaintiff had a verdict and judgment for \$507.10. To reverse the judgment, defendant appeals.

This case was before the Appellate Court on a former appeal in 169 Ill. App. 96.

JOHN M. HERBERT and DENISON & SPILLER, for appellant.

SCHWARTZ & HAYS, for appellee; MORGAN, GALLIMORE & KENDALL, of counsel.

MR. JUSTICE HARRIS delivered the opinion of the court.

Abstract of the Decision.

1. INSURANCE, § 331*—*when provision requiring sound health of insured waived by knowledge of agent.* A provision in a life insurance policy that if the insured is not in sound health when the policy is issued, the liability is limited to a return of the premiums paid, *held* waived where the agent of the insurer was informed that the insured was not in good health at the time, and this though the agent was not informed of the nature and kind of the ailment.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Deming v. The Prudential Ins. Co., 190 Ill. App. 604.

2. **INSURANCE, § 684***—*when question of waiver of provision in policy is for jury.* In an action of a life insurance policy containing a provision that if the insured was not in sound health when the policy was issued the liability of the company should be limited to a return of the premiums, *held* that where the evidence tended to show that defendant's agent was notified that the insured was not in sound health, the court did not err in refusing to direct a verdict for defendant on the ground that the evidence did not show the defendant was not informed of the nature and kind of the ailment.

3. **APPEAL AND ERROR, § 1401***—*conclusiveness of verdict.* The Appellate Court will not disturb a verdict as against the manifest weight of the evidence unless it is apparent that the evidence, if standing, alone is insufficient to support a verdict or the verdict is contrary to the evidence.

4. **APPEAL AND ERROR, § 1408***—*when verdict may be set aside.* The Appellate Court is warranted in disturbing the verdict of a jury as against the manifest weight of the evidence when the evidence considered most favorably in support of the verdict is so unsatisfactory from its kind or character, or where something has been said or done during the trial that impresses the court that the verdict is without evidence to support it or is the result of passion or prejudice.

5. **APPEAL AND ERROR, § 1410***—*grounds for disturbing verdict.* The question of the number of witnesses, weight of evidence and credibility of the witnesses is not a sufficient ground to justify the court in disturbing a verdict.

6. **APPEAL AND ERROR, § 1561***—*when refusal of requested instruction harmless.* A party is not entitled to a repetition of the law in his instructions, and has no right to complain if the court selects from his instructions those regarded by his counsel as the least important so long as the law involved is given to the jury as asked by him.

7. **APPEAL AND ERROR, § 1733***—*conclusiveness of decision on former appeal.* A decision of the Appellate Court on a former appeal in passing on instructions given and the admissibility of certain evidence, *held* conclusive on a subsequent appeal where the cases were tried on the same issues with practically the same instructions and the evidence offered being the same.

8. **APPEAL AND ERROR, § 1514***—*when improper remarks of counsel not prejudicial.* Improper remarks of counsel *held* not reversible error where nothing was said which appealed to sympathy or prejudice or was even disrespectful, except that counsel had spoken when not spoken to and replied when no reply was necessary.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

James L. Nicholson et al., Appellants, v. Nicholson Coal Company et al., Appellees.

(Not to be reported in full.)

Appeal from the Circuit Court of Washington county; the Hon. LOUIS BERNREUTER, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed November 9, 1914.

Statement of the Case.

Bill by James L. Nicholson, Charles E. Dallam, Elizabeth A. Brown and others against the Nicholson Coal Company, M. M. Stephens and others to foreclose three mortgages.

On October 15, 1912, and for some time prior thereto, the Nicholson Coal Company, of which John B. Brasher was president, owned and operated a coal mine near Nashville, Illinois, and held by deed or lease the coal rights connected with some five hundred acres of land and two town lots and also owned a large amount of mining machinery, buildings and articles of personal property, used in carrying on the business of mining. At the time mentioned there were three mortgages on all of said property, one to Charles E. Dallam for \$22,000, another to Elizabeth A. Brown for \$11,700, and the third to William Kimmons for \$1,400. Brasher was anxious to sell the mine, and in that connection called upon certain attorneys who interested M. M. Stephens, a client of theirs, in the matter. Brasher and Stephens were brought together and the matter of the sale discussed by them. Afterwards, on said October 15, 1912, the two met in the office of Johnson and Owen, when Stephens said he was not ready to consider the purchase of the mine but Brasher, who had a payroll for his mine which he was unable to meet, appealed to Stephens to loan him money to make these payments and, after some conversation, Stephens

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loaned him \$2,400 for that purpose and received a note for that amount from the Company, executed by Brasher as president. At the same time a warranty deed for all of the above property was executed by the Company by Brasher, its president, conveying the same to Stephens, said premises being declared in said deed to be free from all incumbrances, except the first two above mentioned. In connection with the same transaction and at the same time, the following memorandum was drawn up and signed by Stephens:

“This memorandum witnesseth: that there is now pending between the Nicholson Coal Company and M. M. Stephens, acting as trustee, for himself and others, a proposition for the sale, by the Coal Company, of its mining property and equipment at Nashville, Ill., and that whereas it has been deemed advisable to have an expert examine the Coal Mine and the coal mining property and equipment before completing the transaction and it is necessary to provide the funds this day to said Nicholson Coal Company with which to make the payroll this day maturing, amounting in the aggregate to Twenty Four Hundred (2,400) Dollars, and whereas the said M. M. Stephens and associates have advanced said money and have taken a note of the said Nicholson Coal Company therefor, bearing even date herewith:

“Now, therefore, it is understood by and between the respective parties that in case the report of the expert is favorable, that the sale of the said property to the said M. M. Stephens as trustee shall be absolute and all further and necessary deeds, conveyances, instruments or contracts to that effect will be executed by the Nicholson Coal Company, and that the estate in fee simple and in perpetuity will be vested in the said M. M. Stephens upon the terms hereinafter stated, and that on the other hand in case the report of the expert is unfavorable as to the said coal mine and coal mining properties, and the said M. M. Stephens shall so elect, that then, and in this event, the advance of the above named sum shall be considered merely a loan, payable according to the terms of said note, and upon

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the repayment of the same by the Nicholson Coal Company at maturity, said M. M. Stephens will relieve all claims to said property and the same shall reinvest in said Coal Company. It is further understood that if said report of the expert on said coal mine and coal mining properties is favorable, and the sale is consummated that then, and in that event, the said M. M. Stephens, Trustee, is to take the same subject to all existing liens and subject to the payment of the outstanding debts of the said Nicholson Coal Company (inclusive of the advance hereinabove referred together with the payroll maturing October 31st, 1912) all amounting in the aggregate to not to exceed the sum of Fifty Thousand (\$50,000) Dollars and in addition thereto the grantor or its nominees shall receive Twenty Thousand (\$20,000) Dollars worth of stock in the Corporation proposed to be organized to take over said property.

Dated St. Louis, Missouri, this 15th day of October, A. D. 1912.

M. M. STEPHENS."

Later, Stephens again advanced \$2,400 to meet another fortnight payroll and took a note of the Company therefor, and at another subsequent time Stephens and Elizabeth A. Brown signed a note for a like amount for another payroll, when said Elizabeth A. Brown took charge of the mine to collect the amounts so advanced.

Stephens thereafter had some connection with the operation of the mine, and he testified that while Brasher said he would turn over the mine to him it was never in fact so turned over and that he never had possession of the books or keys.

The bill filed by complainants set out the indebtedness referred to in the three mortgages, showing the amount unpaid thereon, stating that appellants owned a part of said indebtedness and that the same was due by the terms thereof, and also set forth in full the above memorandum signed by Stephens. It further

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alleged that a favorable report was made upon said mine and the value of said property and thereupon Stephens accepted and caused to be recorded a deed to him for said property from the Nicholson Coal Company and took possession of the property and that he still holds the same; that complainants were informed that said Stephens denied his liability under said contract of purchase, and contended that the deed taken by him was only given to secure a loan and was in fact a mortgage. The bill prayed for foreclosure of the mortgage and that if the debts due each of the complainants should not be paid by a day to be named by the court, that the premises be sold and the proceeds applied, first to the payment of the costs and of said mortgage liens and the surplus to the payment of the debts owing to the other complainants; that if the property failed to bring a sufficient amount to pay complainants in full, judgment be entered in favor of each of the same against said Stephens for any deficiency.

Defendant Stephens filed his answer denying the material allegations of the bill and charging fraud and misrepresentation made by Brasher. He also filed his cross-bill setting up the execution and delivery of the deed and alleging that the agreement was, that the same was to be treated in the nature of a mortgage to secure the amounts advanced by him, and it prayed that the said deed might be decreed to be a mortgage and foreclosed and that a receiver might be appointed. A decree was entered, ordering the master in chancery to sell the property, and therein all the conflicting rights, interests and equities of the parties were reserved for further hearing and disposition by the court and the cause was referred to the master in chancery to take proof and report his conclusions and findings and recommend a decree. Afterwards the property was sold by the master in chancery for \$4,000, the sale approved and deed for the same executed. The amount received was consumed by costs and fees and two judgments against the receiver and nothing was

left to apply on the mortgage indebtedness. The master afterwards took the evidence as to the conflicting interests of the parties to the suit and reported the same, together with his conclusions to the court.

Objections were filed before the master to his report and overruled and later, having been filed as exceptions, were overruled by the court. The court thereupon entered a decree approving and in accordance with the master's report and finding that by the memorandum entered into by appellant he had the right to elect to purchase said property if the same was acceptable to him or, if not acceptable, that said deed might be treated as a mortgage for the indebtedness due him from the Coal Company; that in case he elected to purchase the property he was to take the same subject to all existing liens and subject to the payment of the outstanding indebtedness of the Company, the same however, not to exceed \$50,000, including the mortgages; but that said Stephens did not assume or agree to pay any part of said outstanding indebtedness, except two payrolls of \$5,000; that the deed to Stephens is a constructive mortgage upon which there is due the sum of \$11,372.28, which is a lien on said property subject to the prior mortgages and judgment liens named in the prior decretal; that judgment should be and is rendered in favor of said Stephens and against said Nicholson Coal Company for said sum of \$11,372.28, and that as to \$4,800 of this amount, represented by the promissory notes of said Company, judgment is also rendered against said John B. Brasher. From the decree so entered, this appeal is prosecuted.

WATTS & MAXWELL, for appellant.

C. PORTER JOHNSON and MALCOLM D. OWEN, for appellee Stephens.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

Krisman v. Johnston City & Big Muddy C. & M. Co., 190 Ill. App. 612.

Abstract of the Decision.

1. MORTGAGES, § 226*—*when grantee not presumed to have assumed payment of debt.* It will not be presumed that the grantee of real estate subject to a mortgage indebtedness has undertaken to pay off such indebtedness and relieve the grantor of his obligation to make such payment, unless it is plainly provided in the instrument of conveyance accepted by the grantee that he shall pay such indebtedness, or it is otherwise so provided by contract to which he is a party.

2. MORTGAGES, § 226*—*when parol evidence admissible to construe agreement as to assumption of debt.* Parol evidence held admissible to explain the language of a memorandum agreement with reference to whether the party signing the same agreed to pay incumbrances on real estate in case he purchased the same.

3. MORTGAGES, § 33*—*parol evidence.* Parol evidence is admissible to show that a deed which is absolute in form is in fact intended to be an equitable mortgage.

4. MORTGAGES, § 222*—*when memorandum agreement does not assume payment of mortgage indebtedness.* A memorandum agreement entered into by a person considering the purchase of real estate, held not to show, when considered with or without the deed, any intention on his part to assume payment of a mortgage indebtedness against the property in case he should take the property.

5. CONTRACTS, § 206a*—*when third party entitled to enforce contract.* Before a third party can acquire a right which he can enforce in a contract between others, he must be a party to the consideration or the contract must have been entered into for his benefit.

Matt Krisman, Appellee, v. The Johnston City and Big Muddy Coal & Mining Company, Appellant.

1. WORKMEN'S COMPENSATION ACT, § 2*—*presumption as to election.* There is a presumption of law that both the employer and the employee are covered by the provisions of the Workmen's Compensation Act of 1911 (J. & A. ¶¶ 5449 et seq.) unless it appears that one or both of the parties have filed an election to the con-

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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trary with the State Bureau of Labor Statistics as provided by the act.

2. **WORKMEN'S COMPENSATION ACT, § 12***—*when recovery in suit for damages cannot be sustained.* In a suit against a mining company to recover damages for personal injuries sustained by a miner while the Workmen's Compensation Act of 1911 was in force, a judgment for plaintiff cannot be sustained where there was no averment in the declaration that the parties were not under the provisions of the act and no proof to show that they or either of them had filed an election not to come under the act.

3. **WORKMEN'S COMPENSATION ACT, § 13***—*necessity of preserving statutory notice in record.* A ruling of the trial court excluding a certified copy of the official notice filed with the State Bureau of Labor Statistics under the provision of the Workmen's Compensation Act of 1911 is not presented for review where the instrument is not preserved in the record.

4. **APPEAL AND ERROR, § 1078***—*presumption in absence of cross-errors.* An appellee must be presumed to be satisfied with the rulings of the trial court where he has filed no cross-errors.

Appeal from the Circuit Court of Williamson county; the Hon. A. E. SOMERS, Judge, presiding. Heard in this court at the March term, 1914. Reversed and remanded with directions. Opinion filed November 9, 1914.

DENISON & SPILLER, for appellant.

NEELY, GALLIMORE, COOK & POTTER, for appellee.

MR. PRESIDING JUSTICE HIGBEE delivered the opinion of the court.

Matt Krisman, a coal miner, brought this suit against The Johnston City and Big Muddy Coal & Mining Company to recover damages for personal injuries received by him while working in the coal mine of said Company in Williamson county. There were five counts in the declaration, but the last three were excluded from the jury and the verdict, which was for \$2,000, was based on the negligence charged in the first two counts.

The first alleged that on July 30, 1912, appellee was working in one of the rooms of appellant's mine, the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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roof of which was in a dangerous condition and liable to fall unless propped up; that there were no caps, props or timbers of sufficient dimensions in the room to prop the roof, and that for three days prior to said date, appellee had demanded such props and timbers from appellant's foreman, but that appellant wilfully failed to furnish the same; that in consequence of such failure, appellee was injured by a fall from the roof. The second count stated the dangerous condition of the roof and alleged that appellant failed to place a conspicuous sign at the place of danger, as notice to all men to keep out.

As to whether appellant was guilty of the negligence charged in the declaration, we will not on this appeal concern ourselves, as the determination of the case must depend upon other reasons than those relating to its merits. At the time the injury complained of occurred, the Act providing for compensation for accidental injuries or death, approved June 10, 1911 (J. & A. ¶¶ 5449 *et seq.*), was in force and the same applied to the business in which appellant and appellee were engaged. Section 3 of this Act provided: "No common law or statutory right to recover damages for injury or death sustained by any employee, while engaged in the line of his duty as such employee other than the compensation herein provided shall be available to any employee who has accepted the provisions of this Act." Paragraph A of subsection 3 of section 1 of said Act provides that every employer included in the act "is presumed to have elected to provide and pay the compensation according to the provisions of this Act, unless and until notice in writing of his election to the contrary is filed with the State Bureau of Labor Statistics." Paragraph C of said subsection provides that when such election is made by the employer, the employee shall be deemed to have accepted all the provisions of said act and is bound thereby, unless within thirty days after his hiring and the tak-

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ing effect of the act he shall file a notice to the contrary with the secretary of the State Bureau of Labor Statistics. It thus appears to be a presumption of law that both appellant and appellee were covered by the provisions of said act, unless it should appear that one or both of them had filed an election to the contrary with the State Bureau of Labor Statistics, as provided by law. *Dietz v. Big Muddy Coal & Iron Co.*, 263 Ill. 480, 5 N. C. C. A. 419. There was no allegation in the declaration that the parties were not under the provisions of the act, and offered no proof to show that appellee had filed the notice required to exempt him therefrom. The record does show, however, that counsel for appellee said: "I desire to introduce plaintiff's Exhibit A in evidence which is a certified copy of the official notice given by the defendant to the State Bureau of Labor Statistics, in which they refuse to operate under the provisions of the compensation act of the State of Illinois." Counsel for appellant objected to the introduction of this exhibit for a number of reasons, among others, that it was not properly certified or proven, and the court sustained the objection and the exhibit was not admitted in evidence. The instrument sought to be introduced is not preserved in the record for our inspection, so that we have no means of determining whether the ruling of the court upon this question was proper or not and therefore it must be presumed that the instrument was properly excluded. Appellee must also be presumed to be satisfied with the ruling of the trial court in this regard as he has filed no cross-errors. Appellant upon the trial offered no proof upon this question. We are therefore bound by the act to hold that under the proofs produced in this case the parties were covered by the provisions of said compensation act and that therefore this suit for damages cannot be sustained.

The judgment will accordingly be reversed and the cause remanded with directions to the court below to

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give leave to appellee to amend his declaration by allegations charging that appellant was at the time of the injury transacting its business under said compensation act, so that evidence may properly be introduced by him upon that question, or to dismiss his suit without prejudice to his right to proceed under said act.

Reversed and remanded with directions.

Ella Spears, Administratrix, Defendant in Error, v. Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Plaintiff in Error.

1. APPEAL AND ERROR, § 800*—*when motion must be preserved in bill of exceptions.* A motion to quash summons and to strike the declaration from the files can be made a part of the record only by a bill of exceptions.

2. APPEAL AND ERROR, § 824*—*section 81 of Practice Act construed.* Section 81 of the Practice Act (J. & A. ¶ 8618) does not change the rule as to the preservation of exceptions but only as to the removal of the record from the trial court to the court of review.

3. APPEARANCE, § 10*—*when making of motion does not constitute general appearance.* A motion by defendant to quash a summons and to strike the declaration on the ground that the declaration did not follow the *præcipe* as to the parties or the amount of damages, *held* not to constitute a general appearance because it called upon the court to determine the merits of the case.

4. APPEAL AND ERROR, § 783*—*when bill of exceptions becomes part of record.* The bill of exceptions becomes a part of the record from the time of signing and filing and not before.

5. PLEADING, § 451*—*grounds for striking declaration.* A motion by defendant to strike the declaration on the ground that it did not follow the *præcipe* as to the parties and the amount of damages, *held* improperly overruled.

Error to the Circuit Court of Saline county; the Hon. A. W. Lewis, Judge, presiding. Heard in this court at the March term, 1914. Reversed and remanded with directions. Opinion filed November 9, 1914.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

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P. J. KOLB and W. F. SCOTT, for plaintiff in error;
BERTRAND WALKER, of counsel.

THOMPSON & THOMPSON and CLARK & HUTTON, for
defendant in error.

MR. JUSTICE HARRIS delivered the opinion of the
court.

This was a suit by defendant in error for ten thousand dollars brought in the Circuit Court of Saline county to the April term, 1911, against the Saline County Coal Company. *Præcipe* for summons filed March 22, 1911. The cause was on May 13, 1911, continued generally. The declaration in the case was filed June 2, 1911, against the Saline County Coal Company and plaintiff in error *ad damnum* two thousand dollars, this being in vacation after the April term, 1911. Summons was issued June 2, 1911, against the plaintiff in error alone, original return of summons dated June 2, 1911. Amended return of summons dated the eleventh day of September, 1911.

Upon motion of defendant in error on June 13, 1911, leave of court was obtained permitting defendant in error to amend *præcipe* and declaration in the case, making new parties defendant, viz., plaintiff in error, and ordered that the clerk issue an *alias* summons for said new parties defendant returnable to the next term of the said Circuit Court. April 10, 1913, order of court granting sheriff leave to amend return of summons against plaintiff in error. *Præcipe* for summons filed in vacation July 31, 1913, against plaintiff in error, in an action on the case *ad damnum* two thousand dollars July 31, 1913, summons issued by clerk accordingly, returnable to the first day of September term, 1913. Return showing summons served August 28, 1913. On September 10, 1913, order of court showing motion under limited appearance to quash summons dated July 31, 1913, motion confessed and summons

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quashed. On September 12, 1913, motion by plaintiff in error by limited appearance to quash summons issued June 2, 1911, and strike declaration filed same day in so far as same relates to the plaintiff in error.

November 28, 1913, the court sustained the motion to quash summons and the same was quashed. The court reserved ruling upon motion to strike declaration and on the second day of December, 1913, overruled the motion to strike declaration, and on the sixth day of December, 1913, entered default against plaintiff in error for failure to plead. On the ninth day of December, 1913, suit was dismissed as to Saline County Coal Company and defendant in error was granted leave to file amended declaration and plaintiff in error ruled to plead by second Wednesday. On Wednesday, the tenth day of December, 1913, a default was entered against plaintiff in error. On Thursday, the eleventh day of December, 1913, a trial was had on the default and damages assessed by a verdict entered in the sum of two thousand dollars, judgment entered thereon in favor of defendant in error and against plaintiff in error for the sum of two thousand dollars and costs of suit.

Plaintiff in error by writ of error asks a reversal of the judgment for the following reasons:

First. Because the court did not obtain jurisdiction of the plaintiff in error.

Second. Because the amended declaration upon which the verdict was returned and judgment entered did not state a cause of action against plaintiff in error.

Third. Because the record in the case would not sustain a judgment against plaintiff in error for all the costs.

In considering the first error assigned, plaintiff in error calls the attention of this court to the certificate of the clerk that no bill of exceptions had been signed and filed. The record filed in this court seems to have

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been prepared and certified under section 81 of the Practice Act (J. & A. ¶ 8618), the plaintiff in error filing *præcipe* for the part of the record it regarded as material and defendant in error filing *præcipe* with clerk for the part she regarded as material. The clerk accordingly prepared and certified the parts of record as called for without the bill of exceptions. It is argued by plaintiff in error that to bring the motion to quash summons and to strike the declaration before this court for review it must be done by bill of exceptions. A motion to strike a part of the files or for leave to file additional plea is no part of the record unless made so by the bill of exceptions. *Green v. Jennings*, 184 Ill. App. 340. Motions for change of venue and for continuance are no part of the record unless made so by the bill of exceptions. *People v. Weston*, 236 Ill. 104. The section of the Practice Act to which our attention has been called does not change the rule as to the preservation of exceptions but only as to the removal of the record from the trial court to the court of review. The bill of exceptions becomes a part of the record from the time of signing and filing of same and not before. Jurisdiction is never presumed. The record must affirmatively show jurisdiction. Counsel in this case proceed upon the theory that if the trial court obtained jurisdiction of plaintiff in error it was under its motion of September 12, 1913, by entry of appearance and in no other way. This court could only examine the record in this regard and the motion when the same was properly made a part of the record by bill of exceptions, which has not been done. The importance of the first error argued, that of jurisdiction of plaintiff in error, is such that it should be considered and determined regardless of the way it is presented, and waiving in this case the failure of the record to preserve by bill of exceptions the motion. It is conceded that if the court obtained jurisdiction of plaintiff in error it was under the motion in question

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by voluntarily submitting to the court questions which called for a decision of the Court on the merits of the case.

The law as to when a party waives his right to summons or notice and submits to the jurisdiction of the court has been by many decisions of our Supreme Court established. However, each case differs in the application of the law to the facts. In the case of *Nicholes v. People*, 165 Ill. 502, the court summarized the authorities upon the question and determined when a party submitted to jurisdiction and this decision is now the leading case in this State upon the subject and is so recognized by counsel on both sides in their argument of error in this case. The difference between counsel is in the application of the law in that case to the facts of the case at bar.

Plaintiff in error limited its appearance and had the right to so appear and question the sufficiency of notice to confer jurisdiction, and if it went no further the court would have no right to render judgment. If plaintiff in error appeared to the merits and made a defense which could only be maintained by the exercise of jurisdiction, the appearance is general whether it is in terms limited or not. 2 Encyc. of Pleading and Practice 625.

The *præcipe* for summons against the Saline County Coal Company filed March 22, 1911, *ad damnum* ten thousand dollars, the declaration filed June 2, 1911, against Saline County Coal Company and plaintiff in error *ad damnum* two thousand dollars, and *præcipe* filed July 31, 1913, against plaintiff in error *ad damnum* two thousand dollars. A summons issued thereon, which summons was on September 10, 1913, quashed by defendant in error confessing the motion to quash.

There were three papers on file in this case on December 2, 1913, when the court overruled the motion of plaintiff in error to strike the declaration, the two *præcipes* and the declaration.

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The *præcipes* filed at different dates laying the damages at different amounts and against different defendants. The declaration including both defendants, one of which had filed pleas to the merits and the other denying jurisdiction. A declaration not following the *præcipe* theretofore filed as to parties or in amount of damages and filed as against another party without being preceded by *præcipe* for summons and without leave of court in term time or judge in vacation. It may be true that in this condition of the record it was immaterial to plaintiff in error whether the declaration remained on file or not, or whether it and the *præcipe* filed against another defendant agreed as to the amount of damages, and it is immaterial to the court. What the court had to determine was whether or not did plaintiff in error by voluntarily making such a motion, and assigning the reason that the declaration and the *præcipe* filed against another defendant differed in amount of damages, does any more than object to the manner in which it was brought before the court and to show that it was not legally there at all. A motion to strike a declaration on the ground that it was not filed following a *præcipe* for summons or by leave of the court in term time or vacation does not call upon the court to determine a question of merits, but only a question of procedure. A declaration not filed in accordance with our established rules of procedure is not legally a part of the files and should on motion be stricken. The fact that this declaration was preceded by a *præcipe* as to one of the defendants would give the filing of the same as against the other defendant no greater dignity than if the latter defendant was the only defendant mentioned in the declaration, and because a motion to strike gives as a reason that the damages laid in the *præcipe* referred to are ten thousand dollars, and in the declaration two thousand dollars does not call upon the court to determine a question of merits as to whether plaintiff in error was

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in any way liable to defendant in error from the allegations of the declaration. As was said in the case of *Nicholes v. People, supra*, the court can only pass upon a question going to the merits upon the hypothesis that it has jurisdiction of the parties; and the objection in that case was in the nature of a general demurrer and called upon the court to decide whether the improvement had been built, paid for and accepted as alleged. So with all the authorities, when you reach the exact question submitted and the conclusion of the court that the party had conferred jurisdiction, it is where the party denying jurisdiction has called upon the court to decide the sufficiency of the allegations of a petition or declaration filed against it. This is not the case here, the reference to the *ad damnum* in declaration and *præcipe* is not by way of determining whether plaintiff in error is liable under the allegations of declaration or for how much, but as a matter of identification of parties under the two *præcipes* filed, and that the declaration should be stricken, first, because it did not follow the filing of any *præcipe* against plaintiff in error; and second, because no leave was sought or obtained to file it. The conclusion reached upon this record as to jurisdiction, we think, is supported by the facts and the application of the law in the following cases: *Ladies of Maccabees v. Harrington*, 227 Ill. 511; *Wilcox v. Conklin*, 255 Ill. 604.

In the case of *Wilcox v. Conklin, supra*, a suit against two defendants, one of which pleaded to merits, the plaintiff in error filed his special appearance and motion to quash the service so had upon him and dismiss the suit. It was urged that the so-called motion was not a motion but an entry of appearance. The Court said: "While the motion was not strictly in proper form, it was intended for a motion and not a mere entry of appearance, and was properly so treated by the court. * * * As plaintiff in error was sued in the Municipal Court of Chicago,—a city in which he

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did not reside,—defendant in error had no right to have the suit to remain on the docket to annoy him, and when these facts were properly brought to the attention of the court the motion to dismiss as to him should have been allowed.”

In this case, while the motion was not strictly in form, each step in the proceeding shows plaintiff in error protesting as to jurisdiction; and from the time the court passed upon the motion to quash the summons and strike the declaration, plaintiff in error took no further part in the proceeding. The court did not obtain jurisdiction of plaintiff in error, and the motion to strike the declaration as to plaintiff in error should have been sustained.

The other errors argued for a reversal of this judgment are with reference to what was done after the ruling by the court upon the motion in question, the loss of jurisdiction by the cause being dropped from docket, the filing of a new declaration and not an amended declaration, the default of defendant prior to the expiration of ten days, the sufficiency of the declaration to sustain the verdict and the entry of judgment against plaintiff in error for all costs.

As this case must be reversed on the question of jurisdiction it will be unnecessary to discuss the other errors argued, if any there are; if this case should proceed further, they will probably be obviated.

The Circuit Court did not acquire jurisdiction over the person of plaintiff in error, and judgment will be reversed and cause remanded with directions to sustain the motion to strike the declaration so far as the same relates to plaintiff in error.

Reversed and remanded with directions.

Schiller v. Madden, 190 Ill. App. 624.

John Schiller, Appellee, v. Oliver H. Madden, Appellant.

(Not to be reported in full.)

Appeal from the Circuit Court of Jasper county; the Hon. THOMAS M. JETT, Judge, presiding. Heard in this court at the March term, 1914. Affirmed. Opinion filed November 14, 1914.

Statement of the Case.

Action by John Schiller against Oliver H. Madden for criminal conversation. The declaration consisted of two counts. The first count alleged that defendant, contriving and wickedly intending to injure plaintiff and to deprive him of the society and assistance of Lucinda Schiller, the wife of plaintiff, on to wit, June 1, 1913, and on divers other days between that day and the commencement of this suit in said Jasper county, wrongfully and wickedly debauched and carnally knew the said Lucinda Schiller, then and there being the wife of plaintiff, and thereby the affection of the said Lucinda Schiller for plaintiff was then and there alienated and destroyed, and also by means of the premises the plaintiff has from thence hitherto wholly lost and been deprived of the society and assistance of the said Lucinda Schiller, the said wife, in his domestic affairs, which said plaintiff ought during that time to have had, and otherwise might and would have had. The second count in the same form alleges seduction. Damages were alleged in the sum of ten thousand dollars. The defendant filed the plea of not guilty. Upon the trial there was a verdict and judgment in favor of plaintiff for one thousand dollars. To reverse the judgment, defendant appeals.

ALBERT E. ISLEY, for appellant.

FITHIAN & KASSERMAN, for appellee.

Schiller v. Madden, 190 Ill. App. 624.

MR. JUSTICE HARRIS delivered the opinion of the court.

Abstract of the Decision.

1. HUSBAND AND WIFE, § 283*—*when proof of criminal conversation with wife not limited by allegations as to time.* In a suit for criminal conversation with plaintiff's wife, where the declaration averred that defendant on, to wit, June 1, 1913, "and on divers other days between that date and the commencement of the suit," had intercourse with plaintiff's wife, etc., *held* it was not error to permit proof of intercourse upon dates prior to June 1, 1913, and within the statute of limitations.

2. PLEADING, § 11*—*effect of allegation under videlicet.* An averment under a *videlicet* does not make the subject-matter material, nor does an averment not under *videlicet* make material that which would otherwise be immaterial.

3. PLEADING, § 11*—*averments as to time.* The fact that an averment is made by *continuando* as to date does not change the materiality or immateriality of dates.

4. HUSBAND AND WIFE, § 285*—*sufficiency of evidence.* In an action for criminal conversation with plaintiff's wife, evidence *held* sufficient to prove a charge of seduction by defendant without any connivance on the part of plaintiff.

5. HUSBAND AND WIFE, § 290*—*when erroneous admission of evidence harmless.* In a suit for criminal conversation with plaintiff's wife, the admission of declarations and promises of the wife made to plaintiff that her conduct in the future would be proper, *held* improper but not reversible error, where there was direct evidence to prove the charge of seduction and no claim that the damages were excessive.

6. HUSBAND AND WIFE, § 289*—*admissibility of evidence.* In a suit for criminal conversation with plaintiff's wife, evidence offered on behalf of defendant of adulterous conduct of plaintiff is competent, not as a bar to the action but in mitigation of damages.

7. HUSBAND AND WIFE, § 285*—*when exclusion of answers to questions not error.* In a suit for criminal conversation with plaintiff's wife, where a witness was asked whether she knew of any attempts by plaintiff to have illicit relations with her or her mother, *held* that the refusal of the court to permit her to answer the questions was not error for the reason that the questions called for an answer as to what she knew about it, instead of whether or not plaintiff had attempted to have illicit relations.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

CASES
DETERMINED IN THE
FIRST DISTRICT
OF THE
APPELLATE COURTS OF ILLINOIS

DURING THE YEAR 1914

**The People of the State of Illinois, Defendant in
Error, v. Barney J. Grogan, Plaintiff in Error.¹**

Gen. No. 18,766.

1. CONTEMPT, § 61*—*when answer must be taken as true.* In a prosecution for contempt on behalf of the People, the answer of the respondent cannot be traversed and must be taken as true, but if the answer states facts that are inconsistent with respondent's avowed purpose and intention as stated in his answer, the court is at liberty to draw its own inferences from the facts stated.

2. CONTEMPT, § 12*—*when person guilty of contempt.* Evidence held not to show that a surety on a bond in a prosecution for malicious mischief intended to induce the acceptance of himself as surety by certain misstatements as to other suits in which he was surety, wherefore, he was not guilty of contempt.

Error to the Municipal Court of Chicago; the Hon. WILLIAM N. GEMMILL, Judge, presiding. Heard in this court at the March term, 1913. Reversed. Opinion filed March 24, 1913.

J. W. SUTTON, for plaintiff in error.

¹This case was not received by the publishers until February 19, 1915.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

MACLAY HOYNE, for defendant in error.

MR. JUSTICE BAKER delivered the opinion of the court.

Plaintiff in error Grogan was by a branch of the Municipal Court, held by Judge Gemmill, adjudged guilty of contempt of court, fined \$200, and to reverse such judgment prosecutes this writ of error. August 17, 1912, William Waite was required by the Municipal Court to give bond in the sum of \$2,500 to answer a charge of malicious mischief. Grogan applied to the clerk of the court to become surety for Waite. The clerk prepared a bond and an affidavit as to the sufficiency of Grogan to become such surety, which was signed by him and sworn to by him before the clerk. He then took the bond and affidavit to Judge Wells of the Municipal Court to have the bond approved. Judge Wells examined him and among other questions asked him if he was on any other bond, and he answered that he was on a bond for \$1,000 and was on several "disorderly" bonds, but thought they had been disposed of. The Judge asked him if the property, 209 South Center avenue, which the affidavit stated was worth \$6,250, was not worth more than that sum, and he answered that he paid \$6,250 for the property and had expended \$3,800 for improvements thereon. The Judge then asked if the property was worth \$10,000 and he answered that it was. The Judge then struck out "\$6,250" and inserted "\$10,000." Grogan in answer to questions of the Judge stated that he owned three hundred acres of land in Jefferson county, Wisconsin, worth \$50,000; that said real estate was clear of incumbrance and that he was worth over and above his indebtedness \$100,000. Judge Wells inserted in the affidavit Grogan's statement as to the Wisconsin land, reswore him to the affidavit and approved the bond.

The State's Attorney filed a petition in the Municipal Court alleging that Grogan "made application for

a bond'' before Judge Wells and in said ''application for bail,'' sworn to before Judge Wells, in answer to the question: ''Are you surety for any one else; if so, for what amount and for what?'' answered, ''Yes, \$1,000''; that Grogan was then surety on three bonds of \$400 each in cases brought by the City of Chicago and on one bond for \$1,000 in a prosecution in the name of the People of the State of Illinois; that since the application for bail was made the defendant in one case brought by the City had been fined and that Grogan was still ''surety for the other defendant in the sum of \$1,800 and not in \$1,000 as stated in his said application for bail before said Judge Wells. The concluding portion of the petition is as follows: ''Wherefore your petitioner asks that this Honorable court enter a rule on said Barney J. Grogan to show cause why he should not be held in contempt of this court for his practices of deceit and misrepresentation upon one of the Honorable Judges of said Municipal Court of Chicago, as hereinbefore shown.'' This is not an averment that Grogan had practiced fraud or deceit on a judge of the Municipal Court, nor is there in the petition any allegation that the misstatement by Grogan in his affidavit as to the amount for which he was surety was made for the purpose of deceiving Judge Wells or inducing him to accept Grogan as surety when he would not, but for such misstatement, have accepted him.

The only evidence introduced or offered in support of the petition was the bonds mentioned in the petition and accompanying affidavit. The respondent answered the petition, stating that he answered fairly and frankly the questions propounded to him by Judge Wells and believed at the time that the answers were true, and that he then believed that the said City cases had been disposed of; that he did not intend to make any false representation as to his property and had no intention to practice fraud or deceit on Judge Wells. He testified as a witness on his own behalf, and his

testimony tended to support the averments of his answer.

The finding of the court was that the defendant practiced deceit and misrepresentation in answering said questions and that, "he is, by reason of said conduct of the defendant in disobeying the order of the Court as aforesaid, guilty of a direct contempt of this Court in open court."

The defendant disobeyed no order of the court, for Judge Wells made no order that defendant do or refrain from doing anything. He was not guilty of contempt of court in open court, for the application to accept him as surety was made to Judge Wells, not to the court, and the bond was approved by the Judge, not by the court.

This is a prosecution in behalf of the People, and it is a cardinal rule that in such proceedings for contempt the answer of the respondent cannot be traversed and must be taken as true. 4 Black Com. 289. If the answer states facts that are inconsistent with respondent's avowed purpose and intention as stated in his answer, the court will be at liberty to draw its own inferences from the facts stated. *In re May*, 2 Flippin, 562. In the answer in this case no facts are stated inconsistent with respondent's purpose and intention as stated in his answer.

But waiving all technical objections, we think that the evidence fails to show that the respondent intended to deceive Judge Wells or induce him by misstatements to accept respondent as surety on a bond, when, if all the facts in relation to the bonds on which he was surety had been stated, he would not have been accepted. The evidence that respondent was worth over and above his indebtedness \$100,000; that he owned in fee clear of incumbrance real estate in Chicago worth \$10,000, and for which he had paid within about two years in purchase price and improvements \$10,000, and that he owned three hundred acres of land in Wis-

The Cincinnati Exhibition Co. v. Johnson, 190 Ill. App. 630.

consin worth \$50,000, which was clear of incumbrance, is not controverted.

We think that the evidence fails to show that the respondent was guilty of contempt and that the rule to show cause should have been discharged.

For the reasons indicated the judgment of the Municipal Court is reversed.

Reversed.

**The Cincinnati Exhibition Company, Appellee, v.
George H. Johnson, Appellant.¹**

Gen. No. 20,600. (Not to be reported in full.)

Interlocutory appeal from the Superior Court of Cook county; the Hon. CHARLES M. FOELL, Judge, presiding. Heard in this court. Reversed with directions. Opinion filed July 17, 1914. Rehearing denied October 17, 1914.

Statement of the Case.

Motion by George H. Johnson to dissolve an injunction granted on a bill filed by the Cincinnati Exhibition Company, a corporation, to restrain said Johnson from performing or playing baseball for any person or corporation other than the complainant during the season of 1914 and 1915. To reverse an order denying the motion, defendant appeals.

The contract contained the following provisions:

“7. The Club may, at any time after the beginning and prior to the completion of the period of this contract, give the player ten days’ written notice to end and determine all its liabilities and obligations hereunder, in which event the liabilities and obligations undertaken by the Club shall cease and determine at the expiration of said ten days; the player at the expiration of said ten days shall be freed and discharged

¹This case was not received by the publishers until February 19, 1915.

from all obligation to render service to the Club. If such notice be given to the player while 'abroad' with the Club, he shall be entitled to his traveling expenses, including Pullman accommodations and meals en route to the City of Cincinnati.

"8. The player agrees to perform for the Club and for no other party during the period of this contract (unless with the written consent of the Club) such duties pertaining to the exhibition of the game of baseball as may be required of him as said Club, at such reasonable times and places as said Club may designate for the National League seasons for the years 1914 and 1915, beginning in April, 1914, and April, 1915, and ending in October, 1914, and October, 1915, unless sooner terminated in accordance with other provisions hereof."

The defendant took a course of training at the expense of complainant in February and March, 1914, and played with the complainant Club from April 14th to April 20th, and the next day signed a contract to play with a Club of the Federal League, a rival organization.

The chief contention of defendant was that because the contract contains a provision that the Club may give the defendant, the player, ten days' written notice to end and determine all its liabilities under a contract, in which event the liabilities and obligations of the Club shall cease and the player be freed and discharged from all obligation to render service to the Club at the expiration of said ten days, the contract is so wanting in mutuality that defendant, being free from personal bar, could not specifically enforce the covenants of complainant, and the complainant cannot therefore enjoin a breach of a negative covenant of the player. Counsel for defendant relied on the case of *Ulrey v. Keith*, 237 Ill. 284, as decisive in favor of their contention.

WINSTON, PAYNE, STRAWN & SHAW, for appellant;
SILAS H. STRAWN, E. E. GATES and R. S. TUTHILL, JR.,
of counsel.

Simco v. Mankowitz, 190 Ill. App. 632.

CHYTRAUS, HEALY & FROST, for appellee.

MR. JUSTICE BAKER delivered the opinion of the court.

Abstract of the Decision.

SPECIFIC PERFORMANCE, § 11*—*when negative covenant in baseball contract cannot be enforced by injunction.* A negative covenant in a baseball player's contract with a Club not to play or perform for any other than the Club, during the baseball seasons for which he was hired cannot be specifically enforced by an injunction, where there is a want of mutuality of remedy because of a provision in the contract giving the Club the right to terminate the contract by giving the player ten days' notice.

McSURELY, J., dissenting.

Isadore B. Simco, Defendant in Error, v. Morris M. Mankowitz, Plaintiff in Error.

Gen. No. 18,771. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. HOSEA W. WELLS, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Reversed and remanded on rehearing. Opinion filed November 4, 1913. Rehearing allowed and additional opinion filed January 13, 1914.

Statement of the Case.

A judgment by confession for \$125 was entered in the Municipal Court of Chicago in favor of Isadore B. Simco against Morris M. Mankowitz on a promissory note and power of attorney authorizing the entry of judgment, and a cognovit confessing judgment on the note. Defendant moved to set aside and vacate the judgment, the motion being based on a petition and affidavit. From a denial of the motion, defendant brought error.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Coan v. Coan, 190 Ill. App. 633.

HENRY L. STROHM, for plaintiff in error.

No appearance for defendant in error.

MR. PRESIDING JUSTICE F. A. SMITH delivered the opinion of the court.

Abstract of the Decision.

1. JUDGMENT, § 80*—*when judgment by confession may be vacated.* The court has power to entertain a motion and petition to vacate a judgment by confession where more than thirty days has elapsed after the entry of judgment.

2. JUDGMENT, § 75*—*when petition presents equitable grounds for vacating judgment.* A petition to vacate a judgment by confession alleging that the *ex parte* proceedings were had without the defendant's knowledge, that all equities and defenses of the maker of the note existed against the plaintiff, that plaintiff was not an innocent purchaser of the note but a party to fraud perpetrated on the defendant, that the note was void and without consideration, and that plaintiff's assignor was guilty of breach of warranty in the sale of an automobile and agreed to make the warranty good, presents equitable grounds for relief entitling the defendant to plead.

3. JUDGMENT, § 80*—*when judgment by confession may be vacated.* Under section 21 of the Municipal Court Act, the court may vacate a judgment after thirty days from its entry, on a petition setting forth facts sufficient to cause the same to be vacated in a court of equity.

Sarah A. Coan, Appellant, v. Michael J. Coan, Appellee.

Gen. No. 19,966. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. EDWARD M. MANGAN, Judge, presiding. Heard in the Branch Appellate Court at the October term, 1913. Affirmed. Opinion filed November 10, 1914. Rehearing denied December 1, 1914.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Coan v. Coan, 190 Ill. App. 633.

Statement of the Case.

Bill for separate maintenance by Sarah A. Coan against Michael J. Coan, charging extreme and repeated cruelty and praying for the custody of two of their three male children. The defendant denied the charges of cruelty and alleged that the complainant had been guilty of habitual drunkenness for more than two years, that she was not a fit person to have the custody of the children, and praying for a divorce and custody of the children. In her cross-bill the complainant denied the defendant's charges. The cause was heard before a chancellor and the court entered a decree in favor of the defendant, dismissing the complainant's bill for want of equity, dissolving the bonds of matrimony, giving defendant the custody of the children and requiring him to pay \$12 per month as alimony to Mrs. M. J. Walsh for the benefit of complainant, and also to pay \$35 as solicitor's fees to complainant. A petition to vacate the decree was filed and denied, and defendant appealed.

EFFIE SEEDS WELLNER, for appellant.

No appearance for appellee.

MR. JUSTICE GRIDLEY delivered the opinion of the court.

Abstract of the Decision.

APPEAL AND ERROR, § 1395*—*when chancellor's findings conclusive.* Where the evidence is conflicting, findings of a chancellor have the force and effect of a verdict, and such verdict will not be disturbed or set aside unless palpably against the weight of the evidence.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Ella W. Magee, Appellant, v. John J. Magee, Appellee.

Gen. No. 19,338. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1913. Affirmed. Opinion filed December 31, 1914.

Statement of the Case.

Bill filed by Ella W. Magee against John J. Magee for a divorce, charging defendant with cruelty and adultery. The case was heard by the chancellor without a jury. From a decree dismissing the bill for want of equity, complainant appeals.

Complainant urged as ground for reversal that upon the evidence adduced she established the averments of her bill and was entitled to a decree of divorce.

WARREN PEASE, for appellant.

GEORGE W. PLUMMER, for appellee.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

Abstract of the Decision.

1. DIVORCE, § 47*—*when evidence insufficient to show cruelty.* Evidence held insufficient to show that the husband was guilty of cruelty so as to entitle the wife to a divorce, where it appeared that the last alleged act of cruelty consisted of a slight discoloration of the wife's face resulting from being struck by his arm or elbow when she was resisting his attempt to break a lock in a door with his knife, and it appeared that the previous acts of cruelty, one of which was explained as accidental, had been condoned by the wife.

2. DIVORCE, § 46*—*when evidence insufficient to prove charge of adultery.* Evidence held insufficient to show that the husband was guilty of adultery so as to entitle the wife to a divorce, where the

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Newman v. Barber Asphalt Paving Co., 190 Ill. App. 636.

only evidence to support the charge was the deposition of a common prostitute in another city, which deposition she was induced to make at the direction of a man, as to whom, she said, "I do everything he tells me to," it appearing she was a confessed victim of the cocaine habit, and the record of her testimony disclosing that while under examination before the commissioner she suffered a mental and nervous collapse for lack of the drug.

**William L. Newman, Administrator, Appellee, v.
Barber Asphalt Paving Company, Appellant.**

Gen. No. 19,406. (Not to be reported in full.)

Appeal from the Circuit Court of Cook county; the Hon. CHARLES H. BOWLES, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1913. Reversed with finding of fact. Opinion filed December 31, 1914. Rehearing denied January 20, 1915.

Statement of the Case.

Action by William L. Newman, administrator of the estate of James Vernon Meek, deceased, against the Barber Asphalt Paving Company, a corporation, to recover damages for wrongfully causing the death of plaintiff's intestate, who was a boy six years of age. The plaintiff had verdict and judgment for thirty-seven hundred and fifty dollars. To reverse the judgment, defendant appeals.

On July 21, 1909, and for about two weeks prior thereto, appellant was engaged in paving Jackson boulevard near the intersection of Lincoln street, or in repairing the pavement there. The asphalt was hauled to the job in dump wagons drawn by horses, and was not unloaded until it was required to be spread upon the pavement. About ten o'clock in the forenoon of the day named, several wagonloads of asphalt were hauled to the place where the work was in prog-

ress, and as the pavers were not then ready to spread all of the asphalt so then hauled, the drivers of the several wagons were directed to stop their teams and wait until called upon to dump their loads. Mooney, one of the drivers, stopped his team on the east side of Lincoln street, about seventy-five to one hundred feet south of Jackson boulevard, so that his wagon stood about three feet from the curb. The horses were headed north and remained hitched to the wagon. Mooney got off his wagon and went to or near the southwest corner of the streets named, near which point other employees of appellant were then at work, and where other drivers had congregated, to await directions from the foreman, Luke, when and where to drive his team and unload his wagon. During the forenoon, after the wagon in question had stopped on Lincoln street, and while it was standing there, several boys, who lived in the immediate neighborhood, including the deceased, were playing on the east side of the wagon, sitting on the curb engaged in pulling out asphalt, or tar as they called it, with sticks or with their hands, from openings in the bed of the wagon and rolling it into balls. When the noon hour arrived, Mooney, who was then standing in the street, ten or fifteen feet from his team, was told by Luke to feed his team, as his wagon would not be unloaded until after dinner. As Mooney advanced towards his team, or while he took hold of his horses' heads for the purpose of leading them up, they moved forward two or three feet, and the right rear wheel of the wagon ran over the body of the deceased, causing injuries which resulted in his death.

CALHOUN, LYFORD & SHEEAN, for appellant; EDWARD W. RAWLINS, of counsel.

A. W. FULTON, for appellee; ROBERT S. COOK, of counsel.

Pospisil v. Hajcek, 190 Ill. App. 638.

MR. PRESIDING JUSTICE BAUME delivered the opinion of the court.

Abstract of the Decision.

1. NEGLIGENCE, § 58*—*when failure to fasten team and wagon left standing on street not proximate cause of injury to child.* Failure of the driver of a team and wagon to fasten the horses when standing upon a public street, *held* not to be the proximate cause of the death of a child by being run over by a wheel of the wagon, where the evidence shows the horses did not move a greater distance than they might have moved if they had been fastened, as horses are ordinarily fastened, when standing upon a street.

2. NEGLIGENCE, § 19*—*extent of doctrine of attractive nuisance.* The doctrine of "attractive nuisances" has not been extended to a team and wagon or other like vehicle standing or moving upon a street.

3. NEGLIGENCE, § 16*—*when presence of team and wagon on street does not constitute.* Negligence cannot be predicated upon the mere presence upon a street of a team and wagon either stationary or in motion.

4. NEGLIGENCE, § 16*—*when driver leaving team and wagon on street not guilty of negligence.* A driver of a team and wagon left standing upon a street, *held* not guilty of negligence where a child of tender years was run over by a wheel of the wagon when the team started up, it appearing that the driver did not know or had no reason to believe that the child was in a position of danger where he might be injured if the team started forward.

Antonie Pospisil, Defendant in Error, v. Frank G. Hajcek, Plaintiff in Error.

Gen. No. 19,164. (Not to be reported in full.)

Error to the Municipal Court of Chicago; the Hon. FREDERICK L. FAKE, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1913. Affirmed. Opinion filed December 31, 1914.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Statement of the Case.

Action by Antonie Pospisil against Frank G. Hajicek to recover the unpaid part of an alleged deposit of \$1,200 made by plaintiff in defendant's private bank. To reverse a judgment entered on a verdict in favor of plaintiff for \$900, defendant prosecutes a writ of error.

The record evidence disclosed that plaintiff and her husband were saloon keepers who usually kept a great deal of their money at their home, and were doing a profitable saloon business and were also keeping boarders, and that they were taking in from \$50 to \$100 a day. Both of them had had deposit accounts at the bank of defendant for years, and on August 10, 1910, plaintiff opened a new account in her name by then depositing in gold, currency and checks the sum of \$1,200. She only made two deposits there after that date, one of \$600, June 19, 1911, and the other July 11, 1911, and she never checked any of said moneys out of the bank up to January 13, 1912. On said last date she went to the bank to collect her interest, and Rudolph Hajicek, brother of defendant, calculated her interest at something over \$60, informing her of the interest due she said it was not enough. He replied: "How much interest do you want on \$2,100?" She at once replied, "Lord, we have \$3,000 here!" He then looked at the books of the bank and her pass book and told her, as she testified: "You have your money here, \$3,100 with interest." She asked him then to write it in her book, as she was then informed that her book did not show it. He testified that what he meant was that she and her husband both had over \$3,000 there. He refused to credit her pass book further unless she would bring him some written evidence that she had made more deposits than her pass book showed. She and her daughter both testified positively that on July 11, 1911, she deposited \$1,200,—\$300 in gold and \$900 in currency; that they both saw her husband

Pospisil v. Hajcek, 190 Ill. App. 638.

count it the night before, and that on that day between one and two o'clock P. M. she carried it to the bank in her purse, the currency with a paper band around it marked "\$900," as the husband had fixed it the night before, and the gold tied up in a handkerchief; that Rudolph Hajcek counted it, made an entry in her pass book, slipped it into an envelope and handed it to her; that she returned to the saloon, found a large crowd there, threw the pass book into a drawer, and never saw it any more until she went back for her interest as aforesaid. Neither she nor her daughter ever looked at the pass book, as they testified, until January 13, 1912, when they learned that it only showed \$300 deposited July 11, 1911. The pass book and the deposit slip made out by Rudolph only showed a \$300 deposit. Rudolph could only remember or testify as to the amount of the deposit by the pass book, the deposit slip and the bank books, and from these testified that she on that date only deposited \$300, and that the books showed it all to be currency. He also testified that the deposit slip showed it to be all currency. It was put in evidence and the original is in the record, and it clearly shows the \$300 to be gold as the figures showing the amount are written in the space for gold, below the one just above for currency, thus corroborating her as to the amount of gold deposited on that date. The evidence also disclosed that the parties are all Bohemians, and that plaintiff cannot read English or Bohemian, but that she knows figures when she sees them. The daughter could read and write English.

SMEJKAL, KLENHA & KRASA, for plaintiff in error;
HWASS & LUEBECK, of counsel.

WINSTON & LOWY, for defendant in error; CHARLES
F. LOWY, of counsel.

MR. JUSTICE DUNCAN delivered the opinion of the
court.

Abstract of the Decision.

1. **BANKS AND BANKING, § 119***—*effect of acceptance of pass book without examining entries therein.* The reception of a pass book by a depositor with the entries therein made without examining the same and without complaint constitutes an implied acquiescence in the correctness of the entries and makes the entries an account stated between the parties.

2. **BANKS AND BANKING, § 119***—*conclusiveness of entries in pass book.* The acceptance of a pass book and an acquiescence by the depositor in the correctness of the entries therein are not conclusive on the depositor, but it requires clear and satisfactory proof to open up the transaction and recover for a mistake in the entries, as in the case of opening stated accounts between other individuals.

3. **BANKS AND BANKING, § 118a***—*when finding as to fact of deposit sustained by evidence.* In an action to recover an unpaid part of an alleged deposit in defendant's private bank, which amount the defendant denied was ever deposited, a verdict for plaintiff held supported by the evidence, it appearing that plaintiff was unable to read English, that she was corroborated in several particulars and that she had made only three deposits, so that she should have been able to know approximately how much she had in the bank, and it also appearing that both the plaintiff and defendant were guilty of negligence, the former in not examining the pass book before she left the bank, and the latter in not requiring the plaintiff to make out the deposit slip.

4. **APPEAL AND ERROR, § 1401***—*matters not considered in impeaching verdict.* Neither the testimony of jurors nor of outsiders as to facts derived from members of the jury concerning their action as jurors can be considered by a court of review for the purpose of impeaching the verdict.

5. **BANKS AND BANKING, § 118***—*admissibility of evidence.* In an action to recover an unpaid part of an alleged deposit in defendant's private bank which defendant claimed was never deposited, permitting plaintiff to prove the profits of defendant in said bank for the last five years of its existence, held improper but not reversible error, it appearing that the defendant testified positively that he made no profits in the bank during that time, and his testimony was uncontradicted.

6. **APPEAL AND ERROR, § 549***—*when error in admission of evidence not preserved for review.* The improper admission of evidence is not preserved for review where the record shows no ruling of the court on the question of its relevancy or competency, and hence no exception to any such ruling.

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

Zimmer v. Lyon & Healy et al., 190 Ill. App. 642.

Michael Zimmer, Sheriff, for use of Thomas M. Hunter, Bailiff, Defendant in Error, v. Lyon & Healy and Thomas Cratty, Plaintiffs in Error.

Gen. No. 19,186.

1. JUDGMENT, § 206*—*when joint judgment may be entered on verdict against "the defendant."* A verdict against "the defendant" in a case where there are two or more defendants is sufficient to support a judgment against all the defendants, where it is responsive and the evidence in the record amply warrants a verdict and judgment against all the defendants.

2. APPEAL AND ERROR, § 1522*—*when irregularity in form of verdict not reversible error.* Where a judgment must necessarily be against all the defendants or against none, the fact that the jury rendered a verdict against "the defendant," without other designation, instead of against the defendants is a mere irregularity and not reversible error where the defenses made were common to all the defendants.

3. REPLEVIN, § 208*—*when informal verdict in suit on bond may be corrected by court.* In an action on a replevin bond, where the verdict was informal in not showing a finding of the amount of the debt, the court may correct the verdict, and put it in proper form.

4. REPLEVIN, § 212*—*when entry of judgment on informal verdict harmless.* Where a verdict in a suit on a replevin bond is informal in not showing a finding of the amount of the debt, the entry of a judgment on such verdict is harmless.

5. ATTACHMENT, § 259*—*when "half sheet" does not purport to constitute judgment or evidence as to issuance of special execution.* An instrument designated to be a "half sheet," which was apparently the clerk's memoranda or the judge's minutes in an attachment proceeding, held not to purport to be the record of attachment judgment or the language of the judgment, and not to constitute evidence that no special execution was issued on the attachment judgment.

6. ATTACHMENT, § 158*—*duration of lien after judgment.* Property levied on in an attachment suit is in contemplation of law in the hands of the officer making the levy, and his possession for the use of the attachment creditor is sufficient possession to prevent the acquiring of a superior lien during the interval between judgment

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

and the issuing of a special execution, if such execution is issued in a reasonable time.

7. REPLEVIN, § 169*—*what not a defense in suit on bond.* Where the seller of property under a condition contract of sale replevied the property from an officer, who attached the property while in the possession of the buyer and the replevin suit was decided in favor of the officer, *held* in a suit on the replevin bond that the seller was in no position to urge that the attachment lien was lost for failure of the attachment creditor to have a special execution issued in the attachment suit, where it appeared that he failed to return the property and that under a writ of *retorno habendo* the officer was unable to find the property so that it could be sold under such execution.

8. REPLEVIN, § 192*—*when judgment on bond not excessive.* In an action on a replevin bond, a judgment in favor of plaintiff for \$100 *held* not excessive.

9. ATTORNEY AND CLIENT, § 52*—*presumption as to retainer.* In the absence of proof to the contrary, the legal presumption is that the attorney who brings a suit in the name of another has been retained for that purpose.

10. REPLEVIN, § 203*—*when evidence makes prima facie case for plaintiff in suit on bond.* In an action on a replevin bond, evidence *held* sufficient to establish a prima facie case for plaintiff, where it showed that plaintiff had attached the property while in the hands of the obligor's vendee under a condition contract of sale, that pending that suit the defendant replevied it and that the replevin suit was decided in the plaintiff's favor.

Error to the Municipal Court of Chicago; the Hon. DAVID SULLIVAN, Judge, presiding. Heard in the Branch Appellate Court at the March term, 1913. Affirmed. Opinion filed December 31, 1914.

CHARLES S. KNUDSON, for plaintiffs in error.

J. SCOTT MATTHEWS, for defendant in error; EDWARD B. LUCIUS, of counsel.

MR. JUSTICE DUNCAN delivered the opinion of the court.

In an action of debt on a \$300 replevin bond, judgment was entered for \$100 as damages against Lyon & Healy, a corporation, as principal, and Thomas Cratty

*See Illinois Notes Digest, Vols. XI to XV, and Cumulative Quarterly, same topic and section number.

as surety, plaintiffs in error, in a jury trial. The affidavit of defense is, in substance, that in the replevin suit no evidence was heard upon the merits; that that suit was dismissed for want of prosecution and that judgment was entered therein for defendant in error awarding the writ of *retorno habendo* without costs; that a valid writ of *retorno habendo* was never issued therein and that defendant in error had no valid claim or lien on the property replevied; that plaintiff in error Lyon & Healy was the owner of the Victrola and the ninety-nine records replevied prior to and at the beginning of this suit, and still is the owner thereof.

To sustain his suit defendant in error introduced in evidence the replevin bond in the replevin suit of "*Lyon & Healy v. Thomas M. Hunter, bailiff*," a certified copy of the judgment in replevin, a document designated as "half sheet" in the replevin case and showing the issue of the writ of *retorno habendo*, the writ of *retorno habendo* and the return thereon showing demand on Lyon & Healy and a failure to find or obtain the property replevied; and, also, proof of the value of the property replevied with a stipulation that \$20 was a reasonable attorney's fee for prosecuting the replevin suit, if allowable; and a conditional sale note to Lyon & Healy for \$150, dated October 7, 1910, payable in monthly instalments of \$10 with 6 per cent interest, the first of which was due November 7, 1910, signed by J. Carlisle De Vries, in whose hands the property had been attached August 23, 1911, by Chicago Men Specialist Company, beneficial plaintiff in the court below in the instant suit, said note providing that the title to said Victrola No. 16 shall remain in the vendor, Lyon & Healy, as long as any part of said note remains unpaid, etc., with indorsements showing \$80 paid thereon.

For the purpose of showing that no execution ever issued "on the attachment judgment," as stated to the court, plaintiffs in error offered in evidence a docu-

ment designated as "half sheet" in said attachment suit, on which sheet, among other entries, are the following, to wit:

"Date 1911
9/1 Postp to October 16—9:30 A. M. Pub.
10/25 Deft defltd on noc by pub
11/2 das assess by Ct Three hundred sixty seven 33/100 dol (\$367.33) attach sust judg on deflt & assmt das v deflt Three hundred sixty seven 33/100 dol (\$367.33) &c & spec. exec."

They also offered in evidence the attachment writ in said suit and the affidavit showing the attachment of personal property of J. Carlisle De Vries other than said Victrola and the records, and said conditional sale note, and a written demand upon defendant in error for the return of the Victrola and records to Lyon & Healy, dated September 12, 1911. The usual motions for a directed verdict for plaintiffs in error were denied by the court.

The verdict of the jury was: "We, the jury, find the issues against the defendant—, and assess the plaintiffs' damages at the sum of One hundred and No/100 dollars (\$100.00)." The judgment entered by the court, as certified by the clerk and by the trial judge in the stenographic report of the proceedings before the court at the trial, was against all the plaintiffs in error for \$100 damages and costs of suit. A verdict against "the defendant" in a case where there are two or more defendants is sufficient to support a judgment against all the defendants where it is responsive and the evidence in the record, as in this case, amply warrants a verdict and judgment against all of the defendants. This judgment must necessarily have been against all the defendants or against none of them, and the fact that the jury rendered a verdict against "the defendant" without other designation, instead of against the defendants, is a mere irregularity and is not reversible error, as the defenses made

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in the case were common to all the defendants, every one of which must necessarily fail as to all of the defendants if it fails as to any one of them. *West Chicago St. R. Co. v. Horne*, 197 Ill. 250.

The verdict is also informal in not showing a finding of the amount of defendant in error's debt which every one connected with the suit at all times knew to be \$300, the amount of the replevin bond. The jury found the issues against the defendant and found the amount of damages defendant in error was entitled to recover, and those were the very subjects of inquiry and the only ones unknown at the beginning of the trial. The court had a right to correct the verdict and put it in the proper form, but the entry of judgment on it as returned is harmless error under sections 2 and 3 of the Statutes of Amendments and Jeofails. (J. & A. ¶¶ 301, 302), and section 77 of the Practice Act, (J. & A. ¶ 8614). *Italian-Swiss Agricultural Colony v. Pease*, 194 Ill. 98; *George J. Cooke Co. v. Burke*, 148 Ill. App. 155.

The judgment in attachment appears to have been rendered November 2, 1911, for \$367.33, with an order for a special execution. The property attached was replevied by Lyon & Healy and received thereby by it September 18, 1911, and it has been so disposed of by it that the officer was not able to obtain or locate the same, as shown by the return on the writ of *rotorno habendo*. It is now claimed by plaintiffs in error that the lien of the attachment was lost to defendant in error, because no execution was issued immediately after the judgment in attachment was rendered, and that the judgment itself with order for special execution was no lien on the property, and that the lien acquired by the service of the attachment was merged in the judgment and thereby lost or suspended until execution shall issue. It is thereby argued that Lyon & Healy's title became superior to that of defendant in

error the moment judgment in attachment was rendered, as it then had the property in its possession and to which it was entitled as against all the world, except as to creditors or purchasers of its vendee securing prior rights thereto, while in the hands of such vendee. It is also claimed that there is no valid judgment in attachment and that the record so shows by the document of plaintiffs in error introduced in evidence and designated as "half sheet" in the attachment suit. Those positions are untenable. The "half sheet" referred to was not proved to be and does not purport to be the record of the judgment in attachment or the language in that judgment. There is, therefore, absolutely no evidence in the record as to what is the language or form of that judgment, and, therefore, the cases of *Stein v. Meyers*, 253 Ill. 199, and *City of Chicago v. Mitchell*, 256 Ill. 236, holding that a judgment in the language or abbreviations found in said "half sheet" is not in the English language and, therefore, invalid, are not in point here. That "half sheet" is apparently the clerk's memoranda or the judge's minutes in the attachment suit, showing the different steps taken in the case, and was not offered as the judgment or record of the judgment, but for the purpose of showing that no execution was issued, a fact which the judgment record would not ordinarily show. There is no other proof than the "half sheet" to show there was no execution issued, and the sheet does not amount to such proof. We do not know what that "half sheet" is and the record does not advise us. We cannot assume in the absence of proof that the judgment in attachment was void, or that no execution issued thereon. A similar "half sheet" was exhibited by defendant in error in the replevin suit with similar strange language or abbreviations. The certified copy of the judgment in replevin was entirely different and written in good English. Hence, we conclude the "half sheets" referred to must be mere minutes of

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those judgments. If there was a valid judgment in attachment for \$367.33 with an award of a special execution, as indicated by the record, it would be a lien on the property attached dating from the levy of the attachment, and would continue to be such a lien thereon for at least a reasonable time without the issuance of an execution. *Moore v. Hamilton*, 7 Ill. 429; *Martin v. Dryden*, 6 Ill. 187; *A. D. Juilliard & Co. v. May*, 130 Ill. 87.

The property levied on in an attachment suit is, in contemplation of law, in the hands of the officer making the levy, and his possession for the use of the attaching creditor is sufficient possession to prevent the acquiring of a superior lien during the interval between judgment and the issuing of the special execution, if it issues in a reasonable time. That possession of the officer was interfered with by Lyon & Healy in its replevin proceedings, and until it returned the property to the officer as it was legally required to do by the order of the court in the replevin suit, it was not in a position to complain of the failure of a special execution to issue in the attachment suit. No sale of the property could be made until the property could be found, and that was sufficient excuse for not issuing the execution, if it was not issued.

The evidence of the defendant in error made a prima facie case, and he was entitled to recover unless plaintiffs in error proved their allegations that Lyon & Healy was the owner of the property replevied, or that it had a superior lien on the same, or that defendant in error had no right or claim to the property whatever. The burden of proof was upon them to prove those allegations, and failing to prove any of them judgment was properly given to defendant in error. *Magerstadt v. Harder*, 199 Ill. 271.

The damages were not excessive. The proof was ample that the reasonable cash value of the Victrola was \$80 or more, and defendant in error was prop-

erly allowed \$20 more for attorney's fees. The judgment in attachment was for \$367.33, and there is no evidence in the record that all the other property levied on including the Victrola was worth more than that sum.

The proof in this record did not show that defendant in error's attorney was not authorized to bring and prosecute this suit. In the absence of proof to the contrary, the legal presumption is that the attorney who brings a suit in the name of another has been retained for that purpose. *Bell v. Farwell*, 189 Ill. 414.

The conditional sale note which permitted the possession of the Victrola to remain in the vendee was invalid as against attaching creditors of the vendee, and its introduction by defendants in error did not debar him from recovery. The evidence disclosed that defendant in error had attached the property in the hands of the vendee, and that pending that suit Lyon & Healy replevied it from the officer, and that the replevin suit was decided in the officer's favor. That was a prima facie showing that defendant in error was entitled to recover in this suit which plaintiffs in error never overcame.

No reversible errors are shown in the record, and the judgment is affirmed.

Affirmed.

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